

No. 10675

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United States *Vol*  
Circuit Court of Appeals  
For the Ninth Circuit. *2372*

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OREGON SHORT LINE RAILROAD COM-  
PANY, a corporation, SAINT PAUL-MER-  
CURY INDEMNITY COMPANY OF ST.  
PAUL, a corporation and UNION PACIFIC  
RAILROAD COMPANY, a corporation,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Idaho  
Eastern Division



No. 10675

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United States  
Circuit Court of Appeals  
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Eastern Division





L. J. Lane, Editor

19 Boston



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

H. B. THOMPSON

Salt Lake City, Utah

L. H. ANDERSON,

Pocatello, Idaho

Attorneys for Appellants.

JOHN A. CARVER, United States District At-  
torney

E. H. CASTERLIN

R. W. BECKWITH

Assistant United States District Attorneys  
Boise, Idaho

Attorneys for Appellee. [2\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States  
In and For the District of Idaho  
Eastern District

No. 1182

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD, a  
Corporation, SAINT PAUL-MERCURY IN-  
DEMNITY COMPANY OF ST. PAUL, a Cor-  
poration, and UNION PACIFIC RAILROAD  
COMPANY, a Corporation,  
Defendants.

## COMPLAINT

The United States of America, plaintiff, by its duly appointed, authorized, acting and proper United States Attorney for the District of Idaho for its cause of action against the above-named defendants, states:

## FIRST COUNT

### I.

That this action is instituted in the name of the United States of America for and on behalf of the Shoshone and Bannock Tribes of Indians for damages accruing by reason of the killing and maiming of certain Indian persons hereinafter named in the manner and form hereinafter described.

## II.

That the United States District Court for the District of Idaho has jurisdiction of this action for the reason that the United States of America is party plaintiff herein and for the further reason that said action is authorized and directed by the provisions of an Act of Congress under date of September 1, 1888 (25 Stat. L. 452).

## III.

That the defendant, Oregon Short Line Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Utah; that said [3] corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the City of Pocatello in the State and District of Idaho, Eastern Division.

## IV.

That said defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah and Northern Railway Company, a railway company named in the Act of Congress hereinabove mentioned, to-wit: 25 Stat. L. 452.

## V.

That the defendant, Saint Paul-Mercury Indemnity Company of St. Paul is a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing and authorized to do business in the State and District of Idaho.

with an agent upon whom process may be served in the State of Idaho as provided for in Title 6, Section 7, U.S.C.A.

## VI.

That on the third day of July 1868, at Fort Bridger in the territory of Utah, the United States of America on behalf of its citizens, and the Shoshone and Bannock tribes of Indians on behalf of its members, in order to maintain peace among the parties, made and concluded a treaty wherein said parties solemnly agreed, among other things, as follows:

And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this Article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid. (15 Stat. L. 673—11 Kappler 1021.) [4]

That the Indian reservation and territory therein above referred to is the Fort Hall Indian Reservation in the State and District of Idaho; that the said defendant, Oregon Short Line Railroad Company or its predecessor, was not one of the persons

designated or authorized to go upon said lands in said treaty.

## VII.

As a consequence of the matters and things hereinabove set forth and in order that commerce and civilization might cross the prairies and extend to the Pacific coast, and that a railroad, the predecessor of the said Oregon Short Line Railroad Company, be privileged to operate over said Indian Reservation, the Congress of the United States of America reconsidered the treaty provisions hereinabove referred to as will more particularly appear in a report made to Congress from the Committee on Indian Affairs, referred to the House calendar and ordered to be printed on June 5, 1888, a copy of which said report is hereto attached, marked Exhibit A and by reference made a part hereof. That it was the intention of Congress as therein expressed and provided that every interest of the Shoshone and Bannock tribes of Indians be jealously guarded and protected against damages in all cases suffered by the Indians on account of the privilege to be granted said railroad.

## VIII.

That in order to carry said intention into effect and for the purpose of jealously guarding and protecting said Shoshone and Bannock tribes of Indians and their posterity and in consideration of permitting and granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a rail-

road system and/or business upon, over and across said Fort Hall Indian [5] Reservation, the said Congress of the United States and said Indians entered into a further memorandum of agreement and the said Congress enacted a statute under date of September 1, 1888 (25 Stat. L. 452) providing among other things, that said Utah and Northern Railway Company, its successors and assigns, execute a bond in the penal sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians, the conditions of said bond being by statute provided as follows:

That said railway company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes or either of them or of their livestock, in the construction or operation of said railway or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States:



That the memorandum agreement herein mentioned is contained in the Act of Congress of September 1, 1888 hereinabove referred to.

### IX.

That the defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah Northern Railway Company and as such the said defendant is now and at all times material to this action has by reason of the terms of said solemn treaty herein mentioned as modified by said memorandum agreement herein referred to and by virtue of the special Act of Congress mentioned herein, operated and maintained a railroad system running railroad engines, cars and trains, across, over, through and upon said Fort Hall Indian Reservation. [6]

### X.

That for the privilege of maintaining and operating said railroad trains, engines and cars, over, through and across said Fort Hall Reservation and by reason of the provisions of said treaty, agreement, and the Act of Congress herein mentioned and by reference made a part hereof, the defendants, Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company of St. Paul, made, executed and delivered to the United States for the use and benefit of the Shoshone and Bannock tribes of Indians and parties in interest, a bond as required by said special Act and in consideration of the privilege herein referred to, the said bond being in words and figures as follows, to-wit:

## BOND

Be It Known, That we, the undersigned, Oregon Short Line Railroad Company, a corporation, successor to the Utah and Northern Railway Company, as principal, and Saint Paul-Mercury Indemnity Company of Saint Paul as surety, are held and firmly bound unto the United States of America in the penal sum of Ten Thousand Dollars (\$10,000.00), lawful money of the United States, for which payment, well and truly to be made, we and each of us bind ourselves, our successors, assigns, heirs, administrators, and executors, jointly and severally, firmly by these presents. The condition of this obligation is such that,

Whereas, The Congress of the United States, by the Act of September 1, 1888 (25 Stat. L. 455), granted a right of way to the Utah and Northern Railway Company over and across the Fort Hall Indian Reservation in the State of Idaho, and

Whereas, Section 14 of said act requires that the company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of \$10,000, for the use and benefit of the Shoshone and Bannock Tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live stock, in the construction or operation of said railway, or by reason of fires originating thereby; [7]

Now Therefore, if the said Oregon Short Line



Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect.

Signed, sealed, and delivered, on this 30th day of July, A. D. 1935.

[Seal] OREGON SHORT LINE RAIL-  
ROAD COMPANY

(Principal)

By /s/ C. R. GRAY

Its President

Attest:

/s/ E. M. KINDLER

[Seal] Assistant Secretary

[Seal] SAINT PAUL-MERCURY IN-  
DEMNITY COMPANY OF  
SAINT PAUL

(Surety)

By WM. F. PATTERSON

Attorney-in-fact

Department of the Interior

Washington

Approved

/s/ OSCAR T. CHAPMAN

Assistant Secretary.

5-3 (undecipherable)

## XI.

That the said defendants by reason of said bond and the laws applicable thereto, became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed or maimed, to make due payment for all damages accruing therefrom; that the said defendants agreed and promised according to the terms of said bond to make due payment for any and all damages accruing by the killing or maiming of any Indian belonging to either of the tribes hereinabove mentioned and agreed and promised to pay said bond and/or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that damages be paid in all cases in the absence of an amicable settlement made by said defendants.

[8]

## XII.

That on the 29th day of October 1941 the Union Pacific Railroad Company as successor, assignee or lessee of the defendant Oregon Short Line Railroad Company, while operating a railroad train over, through, and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the W $\frac{1}{2}$  of the NE $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into and upon a certain automobile occupied by Ninip Toane, Helen Toane and Frank Poewe, said persons being

Indians and members of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed and being wards of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indians were maimed and killed; that the said railroad train operating as aforesaid did run into and cause such serious injury as to result in the death of the said Ninip Toane and the said Helen Toane, his wife; that said railroad train did cause severe and permanent injuries to the said Frank Pooewe in that the said train at the time of the collision herein mentioned did cut, bruise and injure the said Frank Pooewe in and about his head, legs and body and did otherwise inflict injury to the said Frank Pooewe resulting in great pain and suffering and both temporary and permanent disability.

### XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein, as required by said bond and the provisions of the Act of Congress of [9] September 1, 1888 hereinabove referred to and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress although demand for payment has been made; that funeral expenses incurred for the burial

of the Indian persons killed as hereinabove set forth approximate the sum of \$2,000.00; that by reason of the matters and things herein alleged and set forth and by reason of the death of said Indians Ninip Toane and Helen Toane, his wife, and by reason of the severe and permanent injury to Frank Pooewe the parties in interest have suffered and sustained other damages in substantial amounts; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the deceased and injured persons the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid and for its costs and disbursements herein incurred.

## SECOND COUNT

Plaintiff for the Second Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the First Count of this complaint and alleges as follows:

### XII.

That on the 29th day of October, 1941 the Union Pacific Railroad Company as successor, assignee or

less of the defendant Oregon Short Line Railroad Company while operating a railroad [10] train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the  $W\frac{1}{2}$  of the  $NE\frac{1}{4}$  of the  $SE\frac{1}{4}$  of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Ninip Toane, with such violence as to cause the death of the said Ninip Toane, said person being an Indian and member of the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

### XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made;

that the funeral expenses incurred for the burial of the said Ninip Toane approximate the sum of \$1,000.00; that by reason of the matters and things herein alleged and set forth the heirs, representatives and parties in interest of the deceased Ninip Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the [11] plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Ninip Toane the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

### THIRD COUNT

Plaintiff for the Third Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the First Count of this complaint and alleges as follows:

#### XII.

That on the 29th day of October 1941 the Union Pacific Railroad Company as successor, assignee or *less* of the defendant Oregon Short Line Railroad Company while operating a railroad train over, through and across said Fort Hall Indian Reserva-



tion at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the  $W\frac{1}{2}$  of the  $NE\frac{1}{4}$  of the  $SE\frac{1}{4}$  of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Helen Toane, with such violence as to cause the death of the said Helen Toane, said person being an Indian and member of the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a [12] ward of the United States Government having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

### XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that the funeral expenses incurred for the burial of the said Helen Toane approximate the sum of \$1,000.00; that by reason of the matters and things

herein alleged and set forth the heirs, representatives and parties in interest of the deceased Helen Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Helen Toane the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

#### FOURTH COUNT

Plaintiff for the Fourth Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations heretofore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the First [13] Count of this complaint and alleges as follows:

#### XII.

That on the 29th day of October 1941 the Union Pacific Railroad Company as successor, assignee or lessee of the defendant Oregon Short Line Railroad Company, while operating a railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the W $\frac{1}{2}$  of the NE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 2, T. 5 S.,



R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Frank Pooewe, causing severe and painful injuries to the said Frank Pooewe, said person being an Indian and a member of the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the Place and point where said Indian person was injured.

### XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that by reason of the injuries sustained as aforesaid by the said Frank Pooewe, the said Frank Pooewe has suffered and incurred various and [14] diverse expenses in and about being relieved and cured of said injuries; that he has suffered great pain and mental anguish as a result of said injuries and has suffered both temporary and permanent disability

by reason of same and has otherwise been damaged in the sum of \$10,000.00; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and for the use and benefit of the said Frank Poewe and other parties in interest the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

### FIFTH COUNT

Plaintiff for the Fifth Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the First Count of this complaint and alleges as follows:

### XI.

That the defendant Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and that said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the city of Pocatello, in the State and District of Idaho, Eastern Division. [15]

## XII.

That on or about January 1 1936 said defendant Union Pacific Railroad Company entered into a certain lease, assignment or agreement with the defendant Oregon Short Line Railroad Company whereby and under the terms of which the said Oregon Short Line Railroad Company leased all of its property to the said defendant Union Pacific Railroad Company and that since said date the said defendant Union Pacific Railroad Company has been at all times in the management, control and operation of said property.

## XIII.

That by reason of the Act of Congress granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the defendant Oregon Short Line Railroad Company and the defendant Union Pacific Railroad Company became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured to make due payment for all damages accruing therefrom; that the said defendants agreed and promised, in the acceptance of the benefits of said statute as successor in interest to the Utah and Northern Railway Company, to make due payment for any and all damages accruing by reason of the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned,

without regard to any limitation upon the amount of any damages suffered and sustained by any person or persons in interest by reason of said killing, maiming or injury; that to provide for payment of damages the defendant Oregon Short Line Railroad Company did execute said bond; that said Act of Congress, while requiring said bond of the defendant Utah and Northern Railway Company and its successors in interest, did not limit the liability of the Utah and Northern Railway Company or its successors in [16] interest for any damages resulting from the operation of said railway to the amount of said bond; that it was the intent of Congress in the adoption and passage of said Act to provide for a fund or indemnity for the payment of damages suffered and sustained by reason of the operation of said railway through said reservation but that it was the intent and purpose of said act, as appears therefrom, that the said Utah and Northern Railway Company or its successors in interest should become and remain absolutely liable for any and all damages suffered or sustained by any Indian or Indians on said reservation to the full extent of such damages.

#### XIV.

That the said defendant Saint Paul-Mercury Indemnity Company by reason of the execution of said bond and the laws applicable thereto became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured, to make due payment for all damages accruing therefrom up to but not exceeding the sum of \$10,000.00; that the said defendant agreed and

promised, according to the terms of said bond, to make due payment for any and all damages accruing by the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, and agreed and promised to pay said bond or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that such damages be paid in all cases in the absence of an amicable settlement of any and all claims made upon said defendant Oregon Short Line Railroad Company and said defendant Saint Paul-Mercury Indemnity Company.

#### XV.

That on the 29th day of October 1941 the defendant Union Pacific Railroad Company while operating under the aforesaid lease and in the operation and management of its [17] railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the  $W\frac{1}{2}$  of the  $NE\frac{1}{4}$  of the  $SE\frac{1}{4}$  of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Ninip Toane, with such violence as to cause the death of the said Ninip Toane, said person being an Indian and member of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation, for whose benefit the treaty agreement, special act and bond herein mentioned and set



forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

## XVI.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by the provisions of said Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that the funeral expenses incurred for the burial of the said Ninip Toane approximate the sum of \$1,000.00; that by reason of the matters and things herein alleged and set forth the heirs, representatives and parties in interest of the deceased Ninip Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the plaintiffs for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Ninip Toane the sum of \$25,000.00. [18]

Wherefore, plaintiff demands judgment against the defendants Oregon Short Line Railroad Company and Union Pacific Railroad Company in the sum of \$25,000.00 and against the defendant Saint Paul-Mercury Indemnity Company in the sum of

\$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

## SIXTH COUNT

Plaintiff for the Sixth Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the First Count of this complaint and alleges as follows:

### XI.

That the defendant Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the city of Pocatello, in the State and District of Idaho, Eastern Division.

### XII.

That on or about January 1, 1936 said defendant Union Pacific Railroad Company entered into a certain lease, assignment or agreement with the defendant Oregon Short Line Railroad Company whereby and under the terms of which the said Oregon Short Line Railroad Company leased all of its property to the said defendant Union Pacific Railroad Company and that since said date the said defendant Union Pacific Railroad Company has

been at all times in the management, control and operation of said property.

### XIII.

That by reason of the Act of Congress granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a [19] railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the defendant Oregon Short Line Railroad Company and the defendant Union Pacific Railroad Company became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured to make due payment for all damages accruing therefrom; that the said defendants agreed and promised, in the acceptance of the benefits of said statute as successor in interest to the Utah and Northern Railway Company, to make due payment for any and all damages accruing by reason of the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, without regard to any limitation upon the amount of any damages suffered and sustained by any person or persons in interest by reason of said killing, maiming or injury; that to provide for payment of damages the defendant Oregon Short Line Railroad Company did execute said bond; that said Act of Congress, while requiring said bond of the defendant Utah and Northern Railway Company and its successors in interest, did not limit the liability of the Utah and Northern Railway Company or its



successors in interest for any damages resulting from the operation of said railway to the amount of said bond; that it was the intent of Congress in the adoption and passage of said Act to provide for a fund or indemnity for the payment of damages suffered and sustained by reason of the operation of said railway through said reservation but that it was the intent and purpose of said act, as appears therefrom, that the said Utah and Northern Railway Company or its successors in interest should become and remain absolutely liable for any and all damages suffered or sustained by any Indian or Indians on said reservation to the full extent of such damages. [20]

#### XIV.

That the said defendant Saint Paul-Mercury Indemnity Company by reason of the execution of said bond and the laws applicable thereto became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured, to make due payment for all damages accruing therefrom up to but not exceeding the sum of \$10,000.00; that the said defendant agreed and promised, according to the terms of said bond to make due payment for any and all damages accruing by the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, and agreed and promised to pay said bond or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that such damages be paid in all cases in the absence of an amicable settlement of any and all

claims made upon said defendant Oregon Short Line Railroad Company and said defendant Saint Paul-Mercury Indemnity Company.

### XV.

That on the 29th day of October 1941 the defendant Union Pacific Railroad Company while operating under the aforesaid lease and in the operation and management of its railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the W $\frac{1}{2}$  of the NE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Helen Toane, with such violence as to cause the death of the said Helen Toane, said person being an Indian and member of the Shoshone and Bannock tribes of Indians residing on [21] the Fort Hall Reservation, for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

### XVI.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest

herein as required by the provisions of said Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that the funeral expenses incurred for the burial of the said Helen Toane approximate the sum of \$1,000.00; that by reason of the matters and things herein alleged and set forth the heirs, representatives and parties in interest of the deceased Helen Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Helen Toane the sum of \$25,000.00.

Wherefore, plaintiff demands judgment against the defendants Oregon Short Line Railroad Company and Union Pacific Railroad Company in the sum of \$25,000.00 and against the defendant Saint Paul-Mercury Indemnity Company in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred. [22]

### SEVENTH COUNT

Plaintiff for the Seventh Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the First Count of this complaint and alleges as follows:

## XI.

That the defendant Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and that said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the city of Pocatello, in the State and District of Idaho, Eastern Division.

## XII.

That on or about January 1, 1936 said defendant Union Pacific Railroad Company entered into a certain lease, assignment or agreement with the defendant Oregon Short Line Railroad Company whereby and under the terms of which the said Oregon Short Line Railroad Company leased all of its property to the said defendant Union Pacific Railroad Company and that since said date the said defendant Union Pacific Railroad Company has been at all times in the management, control and operation of said property.

## XIII.

That by reason of the Act of Congress granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a [23] railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the defendant Oregon Short Line Railroad Company and the defendant Union Pacific Railroad Company became obligated in the event

that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured to make due payment for all damages accruing therefrom; that the said defendants agreed and promised, in the acceptance of the benefits of said statute as successor in interest to the Utah and Northern Railway Company, to make due payment for any and all damages accruing by reason of the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, without regard to any limitation upon the amount of any damages suffered and sustained by any person or persons in interest by reason of said killing, maiming or injury; that to provide for payment of damages the defendant Oregon Short Line Railroad Company did execute said bond; that said Act of Congress, while requiring said bond of the defendant Utah and Northern Railway Company and its successors in interest, did not limit the liability of the Utah and Northern Railway Company or its successors in interest for any damages resulting from the operation of said railway to the amount of said bond; that it was the intent of Congress in the adoption and passage of said Act to provide for a fund or indemnity for the payment of damages suffered and sustained by reason of the operation of said railway through said reservation but that it was the intent and purpose of said act, as appears therefrom, that the said Utah and Northern Railway Company or its successors in interest should become and remain absolutely liable for any and all damages suffered or sustained by any Indian or Indians



on said reservation to the full extent of [24] such damages.

#### XIV.

That the said defendant Saint Paul-Mercury Indemnity Company by reason of the execution of said bond and the laws applicable thereto became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured, to make due payment for all damages accruing therefrom up to but not exceeding the sum of \$10,000.00; that the said defendant agreed and promised, according to the terms of said bond to make due payment for any and all damages accruing by the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, and agreed and promised to pay said bond or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that such damages be paid in all cases in the absence of an amicable settlement of any and all claims made upon said defendant Oregon Short Line Railroad Company and said defendant Saint Paul-Mercury Indemnity Company.

#### XV.

That on the 29th day of October 1941 the defendant Union Pacific Railroad Company while operating under the aforesaid lease and in the operation and management of its railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County

Road and U. S. Highway No. 91, within the  $W\frac{1}{2}$  of the  $NE\frac{1}{4}$  of the  $SE\frac{1}{4}$  of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Frank Pooewe, causing severe and painful injuries to [25] the said Frank Pooewe, said person being an Indian and a member of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation, for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indian person was injured.

## XVI.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that by reason

of the injuries sustained as aforesaid by the said Frank Pooewe, the said Frank Pooewe has suffered and incurred various and diverse expenses in and about being relieved and cured of said injuries; that he has suffered great pain and mental anguish as a result of said injuries and has suffered both temporary and permanent disability by reason of same and has otherwise been damaged in the sum of \$25,000.00; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and for the use and benefit of the said Frank Pooewe and other parties in interest the sum of \$25,000.00.

Wherefore, plaintiff demands judgment against the defendants Oregon Short Line Railroad Company and Union [26] Pacific Railroad Company in the sum of \$25,000.00 and against the defendant Saint Paul-Mercury Indemnity Company in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

UNITED STATES OF AMERICA,

By JOHN A. CARVER,  
United States Attorney.

[Endorsed]: Filed June 4, 1942. [27]



[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT

MOTION FOR BILL OF PARTICULARS

Come now the defendants and pursuant to Rule 12 e of the Rules of Civil Procedure move (1) for a more definite statement, and (2) for a bill of particulars, in order to enable said defendants to prepare their responsive pleadings and to prepare for trial.

MOTION TO MAKE MORE DEFINITE  
AND CERTAIN

First Count—

- a. Supply a copy of Exhibit “A” referred to in the First Count of said complaint as no such exhibit was attached to or served with any copy of the complaint served on any of the defendants.
- b. Specify by relationship and names the persons referred to in paragraph XIII as the “parties in interest”, with whom it is alleged the defendants should have but failed to make an amicable settlement.
- c. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased and injured persons” referred to at the end of paragraph XIII, whom the plaintiff claims to have suffered damages and in whose behalf judgment is sought.

## Second Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Ninip Toane” referred to at the end of paragraph XIII, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought.

## Third Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Helen Toane” referred to at the end of paragraph XIII, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought. [28]

## Fourth Count—

- a. Specify the nature and character of the “suffering and painful injuries” alleged in paragraph XII.
- b. Specify by relationship and names the persons designated as “other parties in interest” referred to at the end of paragraph XIII, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought.

## Fifth Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Ninip Toane” referred to at the end of paragraph XVI, whom plaintiff claims have suffered

damages and in whose behalf judgment is sought.

Sixth Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Helen Toane” referred to at the end of paragraph XVI, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought.

Seventh Count—

- a. Specify the character and extent of the “suffering and painful injuries” alleged in paragraph XV.
- b. Furnish particulars in support of the averment that Frank Pooewe has suffered “both temporary and permanent disability” alleged in paragraph XVI.
- c. Furnish particulars in support of the averment that Frank Pooewe has suffered “both temporary and permanent disability and has otherwise been damaged” alleged in paragraph XVI.
- d. Designate by names, ages and residences and the particulars supporting the averment in paragraph XVI of damages to “other parties in interest.”

## BILL OF PARTICULARS

## First Count—

- a. Supply a copy of Exhibit “A” therein referred to as no such exhibit was attached to or served with any copy of complaint served on any of the defendants.
- b. The items and amounts and by whom paid or obligated and to whom paid and incurred amounting to the sum of \$2,000.00 for funeral expenses alleged in paragraph XIII of the first count.
- c. A statement of the items and amounts of “other damages in substantial amounts” alleged in paragraph XIII of the first count, and by whom contracted and paid and to whom. [29]
- d. A statement of the items and amounts and basis of arriving at the difference between \$2,000.00 and “other damages” alleged in paragraph XIII of the first count and the sum of \$10,000.00 therein demanded.

## Second Count—

- a. The items and amounts and by whom incurred and to whom and when aggregating approximately \$1,000.00 for funeral expenses, and a similar itemization or statement of the “other substantial damages” alleged in paragraph XIII of said second count, and the basis of arriving at the difference between their aggre-

gate and the sum of \$10,000.00 therein demanded.

Third Count —

- a. The items and amounts and by whom incurred and to whom and when aggregating approximately \$1,000.00 for funeral expenses, and a similar itemization or statement of the “other substantial damages” alleged in paragraph XIII of said third count, and the basis of arriving at the difference between their aggregate and the sum of \$10,000.00 therein demanded.

Fourth Count—

- a. A statement of the “various and diverse expenses” showing the dates and amounts and to whom paid and by whom paid, alleged in paragraph XIII of said count, and the basis of arriving at the difference between their aggregate and the sum of \$10,000.00 therein demanded, and the names and relationship of the “other parties in interest” therein mentioned.

Fifth Count—

- a. A statement of the items and amounts and by whom incurred and to whom and when aggregating approximately \$1,000.00 for funeral expenses and a similar itemization or statement of the “other substantial damages” alleged in paragraph XVI of said fifth count, and the basis of arriving at the difference between their aggregate and the sum of \$25,000.00 therein demanded, and the names and rela-

tionship of the "heirs, representatives and parties in interest" therein mentioned.

Sixth Count—

- a. A statement of the items and amounts and by whom incurred and when aggregating approximately \$1,000.00 for funeral expenses and a similar itemization or statement of the "other substantial damages" alleged in paragraph XVI of said sixth count, and the basis of arriving at the difference between their aggregate and the sum of \$25,000.00 therein demanded, and the names and relationship of the "heirs, representatives and parties in interest" therein mentioned. [30]

Seventh Count—

- a. A statement of the "various and diverse expenses" showing the dates and amounts and to whom paid and by whom paid alleged in paragraph XVI of said count, and the basis of arriving at the difference between their aggregate and the sum of \$25,000.00 therein demanded, and the names and relationship of the "other parties in interest" mentioned in said paragraph.

GEO. H. SMITH,

H. B. THOMPSON

L. H. ANDERSON,

Attorneys for Defendants.



Residence & P. O. Address:

Attorneys for Defendants:

GEO. H. SMITH,  
Salt Lake City, Utah.

H. B. THOMPSON, and  
L. H. ANDERSON,  
Pocatello, Idaho.

Service and receipt of a copy of the foregoing Motion for More Definite Statement and Motion for Bill of Particulars is hereby admitted this 22nd day of June, 1942.

JOHN A. CARVER, AG  
United States Attorney.

[Endorsed]: Filed June 22, 1942. [31]

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[Title of District Court and Cause.]

BILL OF PARTICULARS, ETC.

Comes Now the United States of America, plaintiff, and, waiving the entry of an order herein on the consolidated motions of defendants for a more definite statement and for a bill of particulars in response to said motions, tenders the following:

I.

PARTICULARS REQUESTED UNDER MOTION TO MAKE MORE DEFINITE AND CERTAIN

First Count

(a) Attached hereto is a copy of Exhibit "A"



referred to in the first count of plaintiffs complaint.

(b) As to paragraph XIII the parties in interest referred to in said paragraph are: 1. The Shoshone and Bannock Tribes of Indians; 2. As to Ninip Toane, the Shoshone and Bannock Tribes, Irwin Toane, his son, Fort Hall, Idaho, and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming; [32]

3. As to Helen Toane, the Shoshone and Bannock Tribes; Adelia Toomuzzo Weiser, her mother, Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters; all of Fort Hall, Idaho.

As to Frank Poewe, the Shoshone and Bannock Tribes;

(c) As to paragraph XIII the parties in interest referred to in said paragraph are: 1. The Shoshone and Bannock Tribes of Indians: 2. As to Ninip Toane, the Shoshone and Bannock Tribes, Irwin Toane, son; Fort Hall, Idaho, and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming;

3. As to Helen Toane, the Shoshone and Bannock Tribes: Adelia Toomuzzo Weiser, her mother, Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters; all of Fort Hall, Idaho;

As to Frank Poewe, the Shoshone and Bannock Tribes;

#### Second Count

(a) As to Ninip Toane, The Shoshone and Ban-

nock Tribes of Indians, Irwin Toane, son; Fort Hall, Idaho; and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Fort Washakie, Wyoming; [33]

### Third Count

(a) As to Helen Toane, the Shoshone and Bannock Tribes of Indians; Adelia Toomuzzo Weiser, her mother; Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters, all of Fort Hall, Idaho;

### Fourth Count

(a) Nature and character of suffering and painful injuries: Traumatic hemorrhage of abdomen; fracture of right twelfth rib; contusions of forehead, right eye, arm and hip; nervous disorder; pain in movement of hip and leg; cardiac disease, valvular; trachoma.

(b) The Shoshone and Bannock Tribes of Indians;

### Fifth Count

(a) The Shoshone and Bannock Tribes of Indians; Irwin Toane, son, Fort Hall, Idaho, and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming;

### Sixth Count

(a) The Shoshone and Bannock Tribes of Indians; Adelia Toomuzzo Weiser, mother; Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters, all of Fort Hall, Idaho; [34]

## Seventh Count

(a) Character and extent of suffering and painful injuries: Traumatic hemorrhage of abdomen; fracture of right twelfth rib; contusions of forehead, right eye, arm and hip; nervous disorder; pain in movement of hip and leg; cardiac disease, valvular; trachoma.

(b) Temporary and permanent disability: Approximately one month's confinement in hospital; suffering from injuries above-mentioned and nervous disorders attendant upon same, including worsening of cardiac disease and trachoma; at least 25% limitation in movement of right hip; limitation on use of legs; increased danger to existing diseases and continued nervousness and nervous disorders, permanently disabling said Frank Poewe.

(c) Otherwise damaged: Continuous and recurring pain and nervousness; permanent danger to existing diseases of heart and trachoma; loss of ability to move about normally; loss of ability to work; diminution of earning capacity; medical and hospital bills; liability for damage to automobile truck resulting from accident; mental anguish. [35]

(d) Shoshone and Bannock Tribes of Indians:

## II.

PARTICULARS REQUESTED UNDER  
MOTION FOR BILL OF PARTICULARS

## First Count

(a) Exhibit "A" referred to in complaint attached hereto.

(b) Funeral Expenses:

\$145 to McCann Undertaking Parlor  
 paid by Estate of Helen Poorah-  
 rah Toane .....\$ 22.50  
 and by Estate of Ninip Toane,.. 122.50

\$150.00 for beef, one owned by Ninip Toane  
 Estate, value \$75.00, one owned by Bill  
 Edmo, value \$75.00, both slaughtered  
 under Agency permit.

\$79.00 for clothing, as follows:

Moccasins .....	\$ 2.00
Buckskin vest .....	6.00
Silk shirt .....	4.00
Buckskin pants .....	12.00
Beaded necktie .....	1.50
Silk scarf .....	3.50
10 silk scarves .....	30.00
Misc.—mourners .....	20.00

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\$79.00

paid for in equal parts by Annie Elk  
 Edmo, Irwin Toane, Toane, and Pansy  
 Edmo.

\$63.28 for groceries, purchased from Safe-  
 way Store, Inc., Pocatello, Idaho  
 paid in equal parts by Annie Elk Edmo,  
 Irwin Toane, Toane, and Pancy Edmo.

(c) Other damages: Automobile truck, \$220.00  
 Pocatello General Hospital, \$34.30, and \$5.00 to  
 Dr. W. L. Olsen, both paid by Fort Hall Agency;

loss of companionship; future earnings, support and maintenance; total and permanent disability.

[36]

(d) Basis of claim for \$10,000.00; Items heretofore mentioned; loss of companionship; maintenance and support; pain and suffering, total and permanent disability; mental anguish.

### Second Count

(a) Ninip Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Parlor paid by Estate of Helen Poorahrah Toane .....\$ 22.50  
and by Estate of Ninip Toane.. 122.50

\$150.00 for beef, one owned by Ninip Toane Estate, value, \$75.00, one owned by Bill Edmo, value \$75.00, both slaughtered under Agency permit.

\$79.00 for clothing, as follows:

Moccasins .....	\$ 2.00
Buckskin vest .....	6.00
Silk shirt .....	4.00
Buckskin pants .....	12.00
Beaded necktie .....	1.50
Silk scarf .....	3.50
10 silk scarves .....	30.00
Misc.—mourners .....	20.00

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\$79.00

paid for in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

\$63.28 for groceries, purchased from Safe-way Store, Inc., Pocatello, Idaho  
paid in equal parts by Annie Elk Edmo,  
Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship;  
future earnings; loss of support.

(c) Basis of claim for \$10,000.00: Loss of com-  
panionship; future support and maintenance.

### Third Count

(a) Helen Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Par-  
lor paid by Estate of Helen  
Poorahrah Toane .....\$ 22.50  
and paid by Estate of Ninip  
Toane ..... 122.50

[37]

\$150.00 for beef, one owned by Ninip Toane  
Estate, value, \$75.00, one owned by Bill  
Edmo, value \$75.00, both slaughtered  
under Agency permit.

\$79.00 for clothing, as follows:

Moccasins .....	\$ 2.00
Buckskin vest .....	6.00
Silk shirt .....	4.00
Buckskin pants .....	12.00
Beaded necktie .....	1.50
Silk scarf .....	3.50
10 silk scarves .....	30.00
Misc.—mourners .....	20.00

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\$79.00

paid for in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

\$63.28 for groceries, purchased from Safeway Store, Inc., Pocatello, Idaho

paid in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship; future earnings; loss of support.

(c) Basis of claim for \$10,000.00: Loss of companionship; future support and maintenance.

#### Fourth Count

(a) Frank Poewe—Expenses:

Medical and hospital, Pocatello General Hospital, Dr. W. L. Olsen \$42.40; Fort Hall Agency Hospital: liability of \$220.00 to Lamar Pokibro for truck damaged; dates October 29, 1941 to November 24, 1941.

(b) Basis of claim for \$10,000.00:

Pain and suffering physically and mentally; total and permanent disability; damage to capacity to work; loss of earnings; mental anguish; worsening of existing diseases; nervousness and nervous disorders. [38]

(c) Other parties in interest:

The Shoshone and Bannock Tribes of Indians;



## Fifth Count

## (a) Ninip Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Par-  
lor paid by Estate of Helen  
Poorahrah Toane .....\$ 22.50  
and by the Estate of Ninip  
Toane ..... 122.50

\$150.00 for beef, one owned by Ninip Toane  
Estate, value, \$75.00, one owned by Bill  
Edmo, value \$75.00, both slaughtered  
under Agency permit.

\$79.00 for clothing, as follows:

Moccasins .....	\$ 2.00
Buckskin vest .....	6.00
Silk shirt .....	4.00
Buckskin pants .....	12.00
Beaded necktie .....	1.50
Silk scarf .....	3.50
10 silk scarves .....	30.00
Misc.—mourners .....	20.00

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\$79.00

paid for in equal parts by Annie Elk  
Edmo, Irwin Toane, Toane, and Pansy  
Edmo;

\$63.28 for groceries, purchased from Safe-  
way Store, Inc., Pocatello, Idaho  
paid in equal parts by Annie Elk Edmo,  
Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship; future earnings; loss of support.

(c) Basis of claim for \$25,000.00: Loss of companionship; future support and maintenance.

(d) Parties in interest: The Shoshone and Bannock Tribes of Indians; Irwin Toane, son, Fort Hall, Idaho; Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming; [39]

### Sixth Count

(a) Helen Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Parlor paid by Estate of Helen Poorahrah Toane .....	\$ 22.50
and by the Estate of Ninip Toane .....	122.50

\$150.00 for beef, one owned by Ninip Toane Estate, value, \$75.00, one owned by Bill Edmo, value \$75.00, both slaughtered under Agency permit.

\$79.00 for clothing, as follows:

Moccasins .....	\$ 2.00
Buckskin vest .....	6.00
Silk shirt .....	4.00
Buckskin pants .....	12.00
Beaded necktie .....	1.50
Silk scarf .....	3.50
10 silk scarves .....	30.00
Misc.—mourners .....	20.00

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\$79.00

paid for in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

\$63.28 for groceries, purchased from Safeway Store, Inc., Pocatello, Idaho  
paid in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship; future earnings; loss of support.

(c) Basis of claim for \$25,000.00: Loss of companionship; future support and maintenance.

(d) Parties in interest: The Shoshone and Bannock Tribes; Adelia Toomuzzo Weiser, mother, Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters.

#### Seventh Count

(a) Frank Poewe—Expenses: Medical and Hospital, Dr. W. L. Olsen, \$42.40; Fort Hall Agency Hospital, \$69.30; [40] liability of \$220.00 to Lamar Pokibro for truck damaged; dates October 29, 1941 to November 24, 1941.

(b) Basis of claim for \$25,000.00: Pain and suffering physically and mentally; total and permanent disability; damage to capacity to work; loss of earnings; mental anguish; worsening of existing diseases; nervousness and nervous disorders.

(c) Other parties in interest: The Shoshone and Bannock Tribes;

JOHN A. CARVER

United States Attorney for  
the District of Idaho

E. H. CASTERLIN

Ass't U. S. Attorney for the  
District of Idaho

PAUL S. BOYD

Assistant U. S. Attorney for  
the District of Idaho. [41]

### EXHIBIT A

#### Shoshone and Bannack Indians

June 5, 1888—Referred to the House Calendar and  
Ordered to be printed.

Mr. Perkins, from the Committee on Indian Affairs, submitted the following

#### Report

(To accompany bill H.R. 8662)

The Committee on Indian Affairs, to whom was referred the bill (H.R. 8662) to accept and ratify an agreement made with the Shoshone and Bannack Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purpose of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes, has carefully considered the provisions of

the bill, and recommend that it do pass, and submit the following report:

This bill was drawn in the Interior Department and is intended to fully cover and protect the interests of the Indians concerned and to provide room for railroad shops and a town-site, imperatively demanded by the necessity of the case, as set forth in the following extracts from a letter from the Honorable Secretary of the Interior, dated February 4, 1888:

(1) The Utah and Northern and Oregon Short Line Railroads cross each other and form a junction at a point within the boundaries of the reservation known as Pocatello Station, where a settlement has gradually grown up, composed mainly of employees of said railroads, with their families, together with other people drawn thereto, for whom sufficient land is represented to be absolutely needed for [42] swelling and for other purposes, to avoid the conflicts and troubles with the Indians arising from trespass upon the reservation; and,

(2) To ascertain and fix the compensation that should be paid to the Indians for land occupied by the Utah and Northern Railway Company as right of way, station grounds, etc., upon the reservation for its line of road, running north and south, already constructed and in operation. The right of way of the Utah and Northern Railway Company through the reservation, granted by the Act of July 3, 1882 (22 Stat. 148), for its Oregon branch running east and west, reported as subsequently assigned to the Oregon Short Line Rail-

way Company, is 100 feet wide, except at Pocatello Station, where it is 200 feet wide with an additional tract at that point comprising 30.45 acres for station purposes, making a total of about 772 acres, for which it was required to pay \$6,000, being at the rate of about \$7.77 per acre.

Under the law granting the right of way (200 feet wide) to the Utah and Northern Railway Company through the public lands (17 Stats., 612), as subsequently amended (20 Stats., 241), that corporation filed in the Department a series of fifteen maps of definite location of its road, eleven of which were approved March 6, 1882; the other four, showing the line of the road through the Fort Hall Reservation, were disapproved March 27, 1882, for the reason that the law granting right of way through the public domain did not entitle it to go through the Indian reservation, which is not public lands within the meaning of the act, and, further, that the consent of the Indians had not been formally obtained, and no compensation had been made to them for the land occupied, the road having already been constructed. A detailed history of this matter is set out in a message sent by you to Congress on the subject December 21, 1885, and printed in Senate Ex. Doc. No. 20, Forty-ninth Congress, first session.

\* \* \* \* \*

As the embarrassments of the situation, resulting from the rapid growth of population of the town within the limits of the reservation and upon the land of the Indians, were daily increasing, the



Department in order to place the matter in shape for definite and speedy action by Congress, instructed one of the United States Indian inspectors and the United States Indian agent for the Fort Hall Indian Agency to confer with the Indians, examine the whole matter, and prepare a plan for the settlement of the questions involved. They called the Indians together in council, to whom, it is reported, they carefully and fully explained the matters, and negotiated with them the agreement herewith submitted, for which the Indians cede and relinquish to the United States, to be disposed of for town-site purposes, as Pocatello, or otherwise, as Congress may direct, for the benefit of the Indians, a tract of 1,840 acres of land, saving therefrom as much as has been heretofore and is by the present agreement relinquished to the United States for the use of the Utah and Northern and the Oregon Short Line railroads, all of which is more clearly shown in the accompanying plats.

The right of way to the Utah and Northern Railway Company through the reservation, north and south, provided for in the agreement, is 200 feet wide (the same as allowed to it through the public domain); this, with the rights of way 200 feet wide at Pocatello Station, already granted by law (22 Stat., 148) to the same company for its line running east and west, make a total width of 400 feet [43] as right of way for the two roads at that point, and the 30.45 acres already granted by law for station and depot purposes to one road, together with the 20 acres for like purposes provided



by this agreement for the other road, make a total of 50.45 acres for station and depot purposes for the two roads at their junction at Pocatello Station. The two roads at that point are constructed and run for some distance on the same road-bed, and use in part the same rails (one being a narrow-gauge road); in view of which it is considered by the Department that the right of way to the Utah and Northern Railway Company for its road running north and south should be there limited to 100 feet in width, making a total right of way 300 feet wide for both roads at Pocatello Station. The draught of the bill has been so framed as to provide for this limitation; this with the ample station and depot grounds there, would seem to afford sufficient land for the ordinary business of the two railroads, reported by the Commissioner of Railroads to be now under one and the same management—that of the Union Pacific Railway Company.

\* \* \* \* \*

The draught of bill provides that the land ceded for the townsite (except the portions heretofore granted and those now proposed to be granted for railroad purposes) shall be surveyed and laid out in lots, appraised, and sold at public auction to the highest bidder, the proceeds to be deposited in the Treasury to the credit and for the benefit of the Indians. It also provides for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the townsite.

The junction of these two railroads at Pocatello will, it is believed, become a town of considerable size and business, assisting and benefited by the development of the country. In this age of progress it is impossible, and it certainly is not desirable, to hinder the building of railroads by blocking the natural routes by great reservations for Indians or for any other purpose. Every part of our country must be brought in communication by the best means with every other part, and when the railroad companies ask nothing but the right of way they should have it in the interest of the people. By this Bill the Utah and Northern Railway Company are to pay at the rate of \$8.00 per acre for the right of

are

way and station grounds; 1,840 acres/to be surveyed and sold at not less than \$10 per lot, the money to be paid to the secretary of the Interior and to bear interest at 5 per cent per annum, and principal and interest to be expended according to his judgment [44] for the support and benefit of the said Indians. This land is now of no benefit to them, and the money for which it is to be sold can be most usefully and profitably invested for them in irrigating ditches, houses, cattle, wagons and implements, wheat, etc. The town, which will certainly grow up, will give them a convenient market for their farm productions and will exercise a most salutary and civilizing influence upon them. The rights of the settlers upon the reservation to be sold in lots, are fully protected by the bill.

The fifteenth section of the bill takes from the

railway company any inducement to "assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their remaining lands", or to "attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided."

It is provided that when any of the lands granted to the railway company for right of way and station grounds shall cease to be used for purposes specified, it shall revert to the Indians. All employees of the railway company living on the granted lands shall be subject to the provisions of the Indian intercourse laws and such rules and regulations as may be established, etc. Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through the improved lands of the Indians. We believe, in short, that every interest of the Indians has been jealously guarded and protected.

It is the settled policy of Congress to encourage the settlement of the lands in the Territories and the development of their vast natural resources, that not only homes for our people may be provided, but fields for the exercise of their industry, energy, enterprise, labor, and capital may be opened up. These [45] objects can best be accomplished by the building of lines of swift and easy communication and transportation by private capital, and therefore we think no great body of land should be reserved for any purpose to stand as an impediment to these great thoroughfares of the people.

[Title of District Court and Cause.]

## ANSWER

Come now the defendants and for answer to the complaint filed herein, and each and every count thereof, admit, deny and allege as follows:

### FIRST COUNT

#### First Defense

That said complaint and said first count fail to state a claim against the defendants, or either of them, upon which relief can be granted.

#### Second Defense

##### I.

Admit the allegations of paragraphs I, II, III, IV, V, and VI of said First Count.

##### II.

Answering paragraph VII of said First Count, the defendants admit on June 5, 1888 a report was made to Congress by the Committee on Indian Affairs, copy of which said report is attached to the complaint filed herein marked Exhibit A and made a part thereof; and defendants admit that said report was made in connection with a proposal then pending before the said Congress of the United States to provide for a right of way for railroad purposes vesting in the predecessor of [47] the defendant, Oregon Short Line Railroad Company, for a railroad operating in a general northerly and southerly direction across the Indian Reservation therein mentioned. Defendants deny each and

every other allegation contained and made in paragraph VII of said First Count.

### III.

Answering paragraph VIII of said First Count, defendants admit that an agreement was made and entered into on the 27th day of May, 1887, between the United States of America and the Shoshone and Bannock tribes of Indians occupying the Fort Hall Indian Reservation in the Territory of Idaho, and that said agreement was ratified and embraced within an Act of Congress approved September 1, 1888, being 25 Stat. L. 452, which said Act of Congress contains, among other things, the portion thereof quoted in Paragraph VIII of said First Count. Defendants further admit that said Act of Congress was passed in furtherance of the purpose to permit and grant the right to the Utah and Northern Railway Company, its successors and assigns, to operate and maintain a line of railroad theretofore constructed over and across said Fort Hall Indian Reservation. Defendants deny each and every other allegation contained and made in paragraph VIII of said First Count.

### IV.

Answering paragraph IX of said First Count, defendants admit that the defendant, Oregon Short Line Railroad Company, is the successor in interest of the Utah and Northern Railway Company and that at all times material in this action has by reason of the terms of the treaty and agreement with the



Indians and Act of Congress mentioned in said complaint, operated and maintained a railroad system, running railroad engines, cars and trains across the Fort Hall Indian [48] Reservation. Deny each and every allegation contained in paragraph IX not hereinbefore expressly admitted.

## V.

Answering paragraph X of said First Count, these defendants admit that pursuant to said Act of Congress approved September 1, 1888, mentioned in said complaint, but not otherwise, the defendants Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company, made, executed and delivered to the United States a bond as required by said Act of Congress in the words and figures set forth in paragraph X of said complaint. The defendants deny each and every allegation contained and made in paragraph X of said First Count not hereinbefore expressly admitted or denied.

## VI.

Answering paragraph XI of said First Count, these defendants admit that by reason of said Act of Congress and said bond they became obligated according to the terms thereof to pay such legal damages as might accrue to the members of the Shoshone and Bannock tribes of Indians by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, in the construction and operation of said railway. Said defendants deny that by reason of said bond and the law ap-



plicable thereto, or either thereof, they, or either of them, became liable or obligated to pay any sum on account of the killing or maiming of any Indian occurring without the fault or negligence of the said Utah and Northern Railway Company or the defendant, Oregon Short Line Railroad Company, successor thereto, or damages for injuries which were not the proximate or natural result or consequence of the operation of its trains or engines within the limits of said Indian Reservation. Deny [49] each and every allegation contained and made in said paragraph XI of said First Count not hereinbefore expressly admitted or denied.

## VII.

Answering paragraph XII of said first count, defendants admit that on the 29th day of October, 1941, at a point where said railroad crosses what is known as the school railroad crossing between the county road and U. S. Highway No. 91, within the West Half of the Northeast Quarter of the Southeast Quarter of Section 2, Township 5 South, Range 34 E.B.M., on the Fort Hall Indian Reservation in Bingham County, State and District of Idaho, a locomotive engine operated by the Union Pacific Railroad Company upon said line of railroad collided with an automobile occupied by Ninip Toane, Helen Toane, and Frank Pooewe, who were then and there rightfully on said Fort Hall Indian Reservation, but deny that said Indians, or any of them, were rightfully upon said railroad crossing at the time and place of their entry thereon immediately

in front of and in close proximity to the locomotive engine then and there in plain sight and hearing of each and every of said Indians. Admit that Ninip Toane and Helen Toane sustained serious injuries from which they died, and that Frank Pooewe sustained a bruise on his head and a fractured rib, resulting in temporary, but not great suffering, and brief temporary disability. These defendants have not knowledge or information sufficient to form a belief as to whether either, all, or any of said Indians were members of the Shoshone and Bannock Tribes of Indians, or either of said tribes, and upon that ground deny each and every of said allegation, and each and every allegation contained and made in paragraph XII of said First Count not hereinbefore expressly admitted or denied. [50]

#### VIII.

Answering paragraph XIII of said First Count, defendants admit that they have refused to make any settlement or pay any sum on account of the death of, or injury to, any of the Indians described in said complaint, but deny that any obligations were or have been incurred by the defendants, or either of them, under said bond and said Act of Congress, or either thereof, on account of the death of or injury to any of said Indians. Defendants deny that funeral expenses were incurred for the burial of Ninip Toane and Helen Toane amounting to approximately the sum of \$2,000.00, or any other sum in excess of \$145.00. Defendants deny each

and every other allegation contained and made in paragraph XIII of said First Count, and each and every other allegation contained and made in said First Count of said complaint not hereinbefore expressly admitted or denied, and deny each and every other allegation contained and made in all or any part of said complaint, and of each and every count thereof, not hereinbefore expressly admitted or denied.

### Third Defense

#### IX.

Further answering said First Count, and as a third separate and distinct defense thereto, these defendants allege that the plaintiff herein seeks recovery solely upon the statute, 25 Stat. L. 452, and the bond given pursuant thereto; that said statute does not create a right of action for the death of a human being, or provide any measure of damages therefor; that said statute is merely one providing for the giving of a bond to secure the payment to the United States, for the use and benefit of members of the Shoshone and Bannock Tribes on the Fort Hall Indian Reservation of damages which may [51] lawfully accrue to them in consequence of the violation of their legal rights by the Utah and Northern Railway Company, or by the Oregon Short Line Railroad Company, as its successors, and not otherwise; that the bond sued upon is not, and can not lawfully be held to be, broader than the statute, or to create a liability or obligation broader than that provided by statute; that said statute and bond do not create liability without fault or negligence

or proximate cause, and that to render judgment in favor of the plaintiff and against the defendants, or either of them, without reference to fault or negligence or proximate cause, would deprive these defendants, and each of them, of property without due process of law, contrary to and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

#### Fourth Defense

##### X.

Further answering said First Count, and as a fourth separate and distinct defense thereto, these defendants allege that at the time and place of the collision described in the complaint, the engine and cars described in said complaint were approaching the highway crossing therein described, on a track that was straight and level, with the headlight of the engine burning brightly, and the bell on the engine ringing continuously, and the steam whistle of said engine being sounded, and said train and engine and the headlight thereof were in plain view of the Indians described in said complaint continuously for at least three quarters of a mile before the engine reached the highway crossing, and could have been clearly seen by all of said Indians before they drove upon said railroad track and in the path of said approaching train if they had looked while in a safe place and at a safe distance, or at any time and point after they were within two hundred feet of said railroad crossing, as it was their duty to do, and likewise [52] the steam whistle and bell of said

engine could have been clearly heard by said Indians before they drove upon said track or within two hundred feet, or any intermediate point, before entering upon said track if they had listened, as it was their duty to do, but that said Indians, well knowing that they were approaching and about to enter upon said railroad crossing, neither looked or listened for said or any approaching train, but drove upon said railroad track and stopped the vehicle in which they were riding when said locomotive engine was so close to said highway crossing that those in charge of said train and engine could not avoid colliding therewith, and that said collision was due solely to the aforesaid acts and omissions of said Indians, which said acts and omissions were the sole proximate cause thereof.

## SECOND COUNT

### First Defense

That said Second Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

### Second Defense

#### I.

The defendants admit the allegations contained in said Second Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XII and XIII of said Second Count to the same extent, and



no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count, and deny each and every allegation contained and made in said Second Count not hereinbefore expressly admitted or denied. [53]

### Third Defense

#### II.

For a third defense to said Second Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph IX of its answer to the First Count of said complaint, designated as Third Defense thereto.

### Fourth Defense

#### III.

For a fourth defense to said Second Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph X of its answer to the First Count of said complaint, designated as Fourth Defense thereto.

## THIRD COUNT

### First Defense

That said Third Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.



## Second Defense

## I.

The defendants admit the allegations contained in said second count by reference to the First Count of said complaint to the same extent, and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XII and XIII of said Third Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count, and deny each and every allegation contained and made in said Third Count not hereinbefore expressly admitted or denied. [54]

## Third Defense

## II.

For a Third Defense to said Third Count the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph IX of its answer to the First Count of said complaint, designated as Third Defense thereto.

## Fourth Defense

## III.

For a fourth defense to said Third Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph X of its answer to the First Count of said complaint, designated as Fourth Defense thereto.

## FOURTH COUNT

## First Defense

That said Fourth Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

## Second Defense

## I.

The defendants admit the allegations contained in said Fourth Count by reference to the First Count of said complaint to the same extent, and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraph XII and XIII of said Fourth Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count, and deny each and every allegation contained and made in said Fourth Count not hereinbefore expressly admitted or denied. [55]

## Third Defense

## II.

For a Third Defense to said Fourth Count the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph IX of their answer to the First Count of said complaint, designated as Third Defense thereto.

## Fourth Defense

## III.

For a fourth defense to said Fourth Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph X of their answer to the First Count of said complaint, designated as Fourth Defense thereto.

## FIFTH COUNT

## First Defense

That said Fifth Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

## Second Defense

## I.

The defendants admit the allegations contained in said Fifth Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XI and XII of said Fifth Count. Answering paragraph XIII of said Fifth Count the defendants admit that the defendant Oregon Short Line Railroad Company executed a bond by which it obligated itself, but not its successors in interest, in the manner and form set forth in paragraph X of the First Count of said complaint; denies each and every other allegation contained in paragraph XIII of said Fifth Count [56] and denies each and every allegation contained in paragraph XIV of said Fifth Count.

The defendants admit the allegations contained in paragraphs XV and XVI of said Fifth Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII or their answer to the First Count.

### Third Defense

#### II.

For a third defense to said Fifth Count, the defendants herein adopt by reference as though the same were fully restated and repeated herein, each and every allegation contained in paragraph IX of their answer to the First Count of said complaint, designated as Third Defense thereto.

### Fourth Defense

#### III.

For a fourth defense to said Fifth Count, the defendants herein adopt by reference as though the same were fully restated and repeated herein, each and every allegation contained in paragraph X of their answer to the First Count, designated as Fourth Defense thereto.

## SIXTH COUNT

### First Defense

That said Sixth Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

## Second Defense

## I.

The defendants admit the allegations contained in said Sixth Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XI and XII of said Sixth Count. Answering paragraph XIII of said Sixth Count, the [57] defendants admit that the defendant Oregon Short Line Railroad Company executed a bond by which it obligated itself, but not its successors in interest, in the manner and form set forth in paragraph X of the First Count of said complaint; denies each and every other allegation contained and made in paragraph XIII of said Sixth Count, and denies each and every allegation contained and made in paragraph XIV of said Sixth Count.

The defendants admit the allegations contained in paragraphs XV and XVI of said Sixth Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count.

## Third Defense

## II.

For a third defense to said Sixth Count the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph IX of their answer to the First Count of said complaint, designated as a Third Defense thereto.

## Fourth Defense

## III.

For a fourth defense to said Sixth Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph X of their answer to the First Count of said complaint, designated as Fourth Defense thereto.

## SEVENTH COUNT

## First Defense

That said Seventh Count fails to state a claim against the defendants, or either of them, upon which relief can be granted. [58]

## Second Defense

## I.

The defendants admit the allegations contained in said Seventh Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XI and XII of said Seventh Count. Answering paragraph XIII of said Seventh Count, the defendants admit that the defendant Oregon Short Line Railroad Company executed a bond by which it obligated itself, but not its successors in interest, in the manner and form set forth in paragraph X of the First Count of said complaint; denies each and every other allegation contained in paragraph XIII of said Seventh Count, and denies each and



every allegation contained in paragraph XIV of said Seventh Count.

The defendants admit the allegations contained in paragraphs XV and XVI of said Seventh Count to the same extent, and no further than the admissions contained in paragraphs VII and VIII of their answer to the First Count.

### Third Defense

#### II.

For a third defense to said Seventh Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph IX of their answer to the First Count of said complaint, designated as Third Defense thereto.

### Fourth Defense

For a fourth defense to said Seventh Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph X of their answer to the First Count of said complaint, designated as Fourth Defense thereto. [59]

These defendants deny each and every allegation of each and every count of said complaint not hereinbefore expressly admitted or denied.

Wherefore, the defendants pray to be hence dismissed with their just costs and disbursements herein incurred.

GEO. H. SMITH,  
H. B. THOMPSON,  
L. H. ANDERSON,

Attorneys for Defendants.

By: H. B. THOMPSON.

Residence & P. O. Address,

Attorneys for Defendants:

GEO. H. SMITH,  
Salt Lake City, Utah.

H. B. THOMPSON, and

L. H. ANDERSON,  
Pocatello, Idaho.

(Affidavit of Mailing attached.)

[Endorsed]: Filed Oct. 2, 1942. [60]

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[Title of District Court and Cause.]

MOTION TO STRIKE FROM ANSWER

Comes now the plaintiff and moves to strike from the answer of the defendants filed herein on October 2, 1943, as follows:

All of the third defense to the first count;

All of the fourth defense to the first count;

All of the third defense to the second count;

All of the fourth defense to the second count;

All of the third defense to the third count;

All of the fourth defense to the third count;

All of the third defense to the fourth count;  
All of the fourth defense to the fourth count;  
All of the third defense to the fifth count;  
All of the fourth defense to the fifth count;  
All of the third defense to the sixth count;  
All of the fourth defense to the sixth count;  
All of the third defense to the seventh count;  
All of the fourth defense to the seventh count;

on the ground that the same are not and do not constitute any defense to plaintiff's complaint and the cause and causes of action therein stated, and any evidence offered in support thereof is incompetent, immaterial and irrelevant.

JOHN A. CARVER

United States Attorney for  
the District of Idaho.

E. H. CASTERLIN

Assistant United States  
Attorney for the District of  
Idaho.

[Endorsed]: Filed Oct. 4, 1943. [61]

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[Title of District Court and Cause.]

### MOTION TO STRIKE

Come now the defendants, Oregon Short Line Railroad Company and Union Pacific Railroad Company, and move to strike from the complaint filed herein the following portions thereof, to-wit:

All of Paragraph XIII of the Fifth Count;

All of Paragraph XIII of the Sixth Count;

All of Paragraph XIII of the Seventh Count;

upon the ground that the same is redundant, immaterial and impertinent.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants,  
Oregon Short Line Railroad  
Company and Union Pacific  
Railroad Company.

Service and receipt of a copy of the foregoing Motion is hereby admitted this 15th day of October, 1943.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff

[Endorsed: Filed Oct. 15, 1943. [62]]

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[Title of District Court and Cause.]

### MOTION TO ELECT

Come now the defendants and move that the Court require the plaintiff to elect upon which of the numerous and conflicting counts set forth in the complaint filed herein it shall proceed upon the trial of this case to enforce the liability of the bondsmen, Saint Paul-Mercury Indemnity Company of St. Paul, on its bond set forth in paragraph X of the First Count of said complaint, and the corre-

sponding liability of the other two defendants based upon said bond and the provision therefor appearing in Section 14 of Act of Congress of September 1, 1888 set forth in paragraph VIII of the First Count of said complaint, and to strike from said complaint the several counts and portions thereof upon which said election shall not be based.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants.

Service and receipt of a copy of the foregoing Motion to Elect is hereby admitted this 15th day of October, 1943.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 15, 1943. [63]

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[Title of District Court and Cause.]

### VERDICT

We, the jury in the above entitled case, find for the plaintiff, and fix damages for the death of Ninip Toane in the sum of \$1250.00; and fix damages for the death of Helen Toane in the sum of \$1250.00; and fix damages for the maiming and injury to Frank Poewe in the sum of \$2000.00.

D. H. MANWARING

Foreman

[Endorsed]: Filed October 19, 1943. [64]

In the District Court of the United States, in and for  
the District of Idaho, Eastern Division.

No. 1182

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD, a  
corporation,

SAINT PAUL-MERCURY INDEMNITY COM-  
PANY OF ST. PAUL, a corporation, and

UNION PACIFIC RAILROAD COMPANY, a  
corporation,

Defendants.

### JUDGMENT ON VERDICT

This matter having come on regularly for trial to  
a jury which has returned its verdict herein,

Now, therefore, it is ordered, adjudged, and de-  
creed that plaintiff have and recover of and from  
the said defendants, jointly and severally, the sum  
of \$1250.00 damages for the death of Ninip Toane,  
and the sum of \$1250.00 damages for the death of  
Helen Toane, and the sum of \$2000.00 damages for  
the maiming and injuring of Frank Poewe, together  
with plaintiff's costs and disbursements incurred  
herein assessed in the sum of \$90.80.



Witness, the Honorable Chase A. Clark, Judge of the above entitled Court and the seal thereof this 20th day of October, 1943.

[Seal]

W. D. McREYNOLDS

Clerk

[Endorsed]: Filed October 20, 1943. [65]

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[Title of District Court and Cause.]

PETITION ON MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT,  
AND, ALTERNATIVELY, FOR A NEW  
TRIAL.

Come now the defendants and move the Court to set aside the verdict and judgment entered thereon and enter judgment in their favor notwithstanding the verdict in accordance with the motion made by the defendant for a directed verdict, and, in the event of the failure of the Court to grant said motion, for an order setting aside the verdict and judgment rendered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the Rules of this Court, on the following grounds:

I.

Insufficiency of the evidence to justify the decision, and that it is against law in this, to-wit:

(a) As stated in the defendants' motion for a directed verdict: that the collision and consequences thereof were not proximately caused by anything that the Railroad Company or its employes in the

operation of the train did or could have anticipated or avoided, but that the sole proximate cause was the act of the driver of the auto attempting to cross the track with a large load of long poles in the immediate presence of a rapidly approaching train, which train he could and should have seen if he had looked therefor, as he was bound to do, and could and should have heard the whistles and bell thereof if he listened therefor, as he was bound to do, and [66] seeing and hearing give precedence of passage to, and but for which the collision would not have occurred. That the collision was not the result of inevitable accident, because it was the duty of the driver to stop his auto and give precedence to the train, the headlights of which was in plain view and the signals of which were being sounded; on the contrary it was inevitable risk. And in addition thereto, that it appears from the evidence that Pooewe, the driver of the automobile, did not know of the approach of the engine or train until immediately before the collision, when Helen Toane apprized him of such fact, at which time the said automobile was on the track and he stalled his engine and was immediately struck by said locomotive.

(b) The evidence is wholly insufficient to support a verdict or judgment for \$1,250.00, or any other substantial amount on account of the death of Ninip Toane, for the reason that the total amount of provable or proven funeral expenses on account of both of the deceased Indians did not exceed \$500.00, of which not more than one half, or \$250.00, was chargeable to the death of Ninip Toane, and the

only other evidence as to damages relative to Ninip Toane was that of his father, who had for a considerable period of time lived apart from Ninip Toane, on an Indian Reservation in Wyoming, and who merely testified when asked what contributions Ninip Toane had made to him "very little", which testimony is insufficient to support an award of any damages, and there is no testimony or evidence that anyone else, Indian or otherwise, sustained any damages or pecuniary loss on account of the death of Ninip Toane, or that any damages accrued to any Indian on account thereof.

(c) The evidence is wholly insufficient to support a verdict or judgment for \$1,250.00 or any other substantial amount, on account of the death of Helen Toane, for the reason that the total amount of provable or proven funeral expenses incurred on account of the death of both of the deceased Indians did not exceed \$500.00, of which not more than one half, or \$250.00, was chargeable to the [67] death of Helen Toane, and the only other evidence as to damages relative to Helen Toane was that of her mother, who was a grown woman at the time of the Nez Perce War, in 1877, and who, if 20 years old in 1877, would now be 86 years old, with substantially no life expectancy, whose testimony would not support a finding of annual contributions from Helen Toane of any substantial or determinable amount, and in no event to exceed \$100.00 a year for two years of expectancy of life of the mother, Adelia Weiser, and there is no testimony or evidence that anyone else, Indian or otherwise, sustained any

damages or pecuniary loss on account of the death of Helen Toane, or that any damages accrued to any Indian on account thereof.

(d) That the evidence is insufficient to sustain any damages for funeral expenses, because such expenditures were a proper charge of the estate of said deceased Indians, and no damages accrued to anyone on account thereof.

(e) That the evidence is insufficient to support a finding that any of the Indians described in the complaint were killed or injured in consequence of the fault or negligence of any of the defendants, or their agents or servants, and accordingly no damages accrued to anyone against any of the defendants on consequence of the collision described in the complaint.

## II.

Excessive damages appearing to have been given under the influence of passion and prejudice, for the reasons hereinbefore set forth under the heading of 'insufficiency of the evidence' paragraph I, subdivisions (b) and (c) thereof.

## III.

Errors in law occurring at the trial as follows:

(a) The court erred in overruling the defendants' objection to the admission of evidence of funeral expenses, for the reason that said expenses were a proper charge of and were paid out of the estate of the deceased Indians, and no damages accrued to any Indian [68] or to the tribe on account thereof.

(b) The court erred in denying the defendants' motion for judgment in favor of said defendants,

for the reasons stated in said motion, and for the reasons hereinbefore stated in paragraph I, subdivision (a) hereof.

(c) The court erred in refusing and denying the defendants' requested instruction numbered one, to the effect that damages do not accrue to anyone for the killing or injuring of a person without negligence or other fault, and that the jury should accordingly render a verdict in favor of the defendants.

(d) The court erred in refusing and denying the defendants' requested instruction numbered 7.

(e) The court erred in refusing and denying the defendants' requested instruction numbered 8.

(f) The court erred in refusing and denying the defendants' requested instruction numbered 9.

(g) The court erred in charging and instructing the jury that the defendants were bound to compensate or indemnify the plaintiff, or those on whose behalf the suit was brought, for loss or injury resulting from inevitable and unavoidable causes.

Said motion is based and will be made upon all the records, files, pleadings and proceedings in said action, including the instructions given, and the instructions requested by the defendants and by the court refused, and upon the minutes of the court as stated and defined in Rule 50 of the Rules of Practice of this Court, which embraces the Reporter's transcript of his notes in said cause.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants



Service and receipt of a copy of the foregoing Petition is hereby admitted this 23rd day of October, 1943.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 23, 1943. [69]

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[Title of District Court and Cause.]

### ORDER

Motion for judgment notwithstanding the verdict, and, alternatively, for a new trial, having been presented by counsel for the defendants, and the matter thereafter set down for hearing. After having heard argument of counsel for both parties and having fully considered the same, and being advised;

It is ordered that the said motions be and they are hereby denied.

Dated: November 18, 1943.

CHASE A. CLARK

United States District Judge

[Endorsed]: Filed Nov. 18, 1943. [70]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the Oregon Short Line Railroad Company, a corporation, Saint Paul-



Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the above named defendants, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled court and cause on the 20th day of October, 1943, which said judgment was in favor of the plaintiff herein and against the defendants.

Dated this 3rd day of January, 1944.

H. B. THOMPSON

Attorney for Defendants,  
Residing at Salt Lake City,  
Utah

L. H. ANDERSON

Attorney for Defendants,  
Residing at Pocatello, Idaho

[Endorsed]: Filed January 3, 1944. [71]

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[Title of District Court and Cause.]

PETITION FOR APPROVAL OF SUPERSEDEAS AND STAY ON APPEAL

Come now the Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the above named defendants-appellants, and represent as follows:

That judgment was entered in the above entitled court and cause on the 20th day of October, 1943,

in favor of the plaintiff and against the defendants, jointly and severally, for the total sum of \$4,500.00 and costs of suit taxed at \$90.80; that said defendants have appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit and desire the court to fix the amount of a supersedeas bond, approve the form thereof, and also approve the Continental Casualty Company, a corporation, as surety, and thereupon order a stay of proceedings according to law.

Now, therefore, petitioners pray that the court fix the amount of said supersedeas bond, approve the bond tendered herewith, and the surety thereon, and order a stay according to law.

Dated this 3rd day of January, 1944.

H. B. THOMPSON

Attorney for Defendants,  
Residing at Salt Lake City,  
Utah

L. H. ANDERSON

Attorney for Defendants,  
Residing at Pocatello, Idaho

[Endorsed]: Filed January 3, 1944. [72]

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[Title of District Court and Cause.]

ORDER APPROVING BOND AND GRANTING  
A STAY OF EXECUTION

The defendants, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity

Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, having this day filed their Notice of Appeal from the judgment rendered in the above entitled cause in favor of the plaintiff and against the defendants jointly and severally to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of a supersedeas bond and approving the bond tendered by said appellants and the surety executing the same, and granting said stay of proceedings.

Now, therefore, it is hereby ordered that the amount of said supersedeas bond be fixed in the sum of Five Thousand (\$5,000.00) and No/100ths . . . . Dollars, and the bond tendered by the said defendants in said sum with the Continental Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated, this 3rd day of January, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed January 3, 1944. [73]

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[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Know All Men By These Presents, that we, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a

corporation, and Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars (\$5,000.00), lawful money of the United States of America, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of January, 1944.

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in said court between United States of America, as plaintiff, and the Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, as defendants, a judgment was rendered in favor of the plaintiff and against said defendants in [74] the total sum of Four Thousand Five Hundred (\$4,500.00) Dollars, and bearing interest at the rate of 6% per annum from the date thereof, to-wit: on the 20th day of October, 1943, with costs amounting to the sum of \$90.80, and said Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corpo-

ration, and Union Pacific Railroad Company, a corporation, having filed in said court a Notice of Appeal to reverse said judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, shall prosecute said appeal to effect, and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award against it, then the above obligation to be void; otherwise to remain in full force and virtue.

OREGON SHORT LINE RAIL-  
ROAD COMPANY, a corpora-  
tion,

SAINT PAUL-MERCURY IN-  
DEMNITY COMPANY OF  
ST. PAUL, a corporation,

UNION PACIFIC RAILROAD  
COMPANY, a corporation,

By L. H. ANDERSON

One of Their Attorneys of  
Record, Residing at  
Pocatello, Idaho,  
Principal

[Seal] CONTINENTAL CASUALTY

COMPANY, a corporation,

By A. B. CHASE

Its Attorney-in-Fact

Surety

A. B. CHASE

Resident Agent [75]

The foregoing Bond is approved as to sufficiency, form and surety, and is allowed as a Supersedeas this 3rd day of January, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed January 3, 1944. [76]

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[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as surety, are held and firmly bound to United States of America, the plaintiff and appellee in the above entitled cause, in the full and just sum



of Two Hundred Fifty (\$250.00) Dollars, to which payment well and truly to be made we bind ourselves and our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of January, 1944.

Whereas, on the 20th day of October, 1943, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that court, wherein United States of America was plaintiff, and the Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad [79] Company, a corporation, were defendants, a judgment was rendered against said defendants jointly and severally in the total sum of Four Thousand Five Hundred Dollars (\$4,500.00), with interest and costs, and said defendants having filed in the office of the Clerk of said District Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the condition of this obligation is such, that if said Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the appellants, shall prosecute said appeal and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the

judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

OREGON SHORT LINE RAIL-  
ROAD COMPANY, a corpora-  
tion,

SAINT PAUL-MERCURY IN-  
DEMNITY COMPANY OF

ST. PAUL, a corporation,  
UNION PACIFIC RAILROAD  
COMPANY, a corporation,

By L. H. ANDERSON,

One of its attorneys of Rec-  
ord, Residing at Pocatello,  
Idaho.

Principal.

[Seal] CONTINENTAL CASUALTY  
COMPANY, a corporation,

By A. B. CHASE,

Its Attorney-in-Fact,  
Surety.

A. B. CHASE,  
Resident Agent. [80]

CONTINENTAL CASUALTY COMPANY  
CHICAGO

CERTIFICATE OF AUTHORITY INDIVID-  
UAL ATTORNEY-IN-FACT

Know All Men By These Presents, That the Con-  
tinental Casualty Company, a corporation duly or-

ganized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint A. B. Chase of Pocatello, Idaho its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows: Any and all Fidelity and Surety bonds in penalty not exceeding Five Hundred Thousand Dollars (\$500,000.00) behalf Union Pacific Railroad Company or its subsidiary or affiliated companies, and to bind the Continental Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of the Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 6th day of January, 1937.

“Article XI Surety Bonds and Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice President may, from time to time, appoint by written certificates Attorneys-in-Fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-

Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice President or the Board of Directors may at any time revoke all power and authority previously given to any Attorney-in-Fact."

In Witness Whereof, The Continental Casualty Company has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed this 17th day of July, 1941.

[Seal]

CONTINENTAL CASUALTY  
COMPANY,

By ROY TUCHBREITER,  
Vice President. [81]

State of Illinois, County of Cook—ss:

On this 17th day of July, 1941, before me personally came Roy Tuchbreiter to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice President of The Continental Casualty Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and ac-

knowledge same to be the act and deed of said corporation.

[Notarial Seal] H. McCRILLUS,

Notary Public.

My Commission expires April 9, 1944.

### CERTIFICATE

I, A. B. Hvale, Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated July 17, 1941 in behalf of A. B. Chase is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this .... day of .... 19....

A. B. HVALE,

Assistant Secretary.

[Endorsed]: Filed January 3, 1944. [82]

[Title of District Court and Cause.]

## TRANSCRIPT OF TESTIMONY

This matter was tried at Pocatello, Idaho, on October 18, 1943, before the Honorable Chase A. Clark, United States District Judge, sitting with a jury.

## APPEARANCES

John A. Carver, United States District Attorney,  
Boise, Idaho

E. H. Casterlin, Assistant U. S. Dist. Attorney,  
Boise, Idaho

R. W. Beckwith, Assistant U. S. Dist. Attorney,  
Boise, Idaho

Attorneys for the Plaintiff,

H. B. Thompson, Pocatello, Idaho

L. H. Anderson, Pocatello, Idaho

Attorneys for the Defendants. [83]

October 18, 1943

10 o'clock A. M.

The Court: Now, on the motion to strike paragraph thirteen of the fifth, sixth and seventh counts of the complaint. There is also a motion to elect. I think I will sustain the motion to elect and require the Government to elect before ruling on any of the other motions that are before the Court at this time.

Mr. Casterlin: The Government will elect to proceed on counts 1, 2, 3 and 4.

Mr. Thompson: And the others, I understand, are stricken?



The Court: Yes. Then they are disposed of now and will not be before the Court so that it will not be necessary to pass upon the other motion in reference to counts that are not before the Court. Counts 1, 2, 3 and 4 are before the Court. The motion to strike the third defense will be granted. As to the fourth defense, this presents a more serious problem. The Ninth Circuit Court of Appeals has said that a complaint based upon the statute did not need to charge negligence against the Railroad Company, and holds that negligence on the part of the Railroad Company does not enter into the right of recovery by the Indians.

From a careful reading of this decision I feel sure the Circuit Court has not passed upon the Fourth defense in any way, as set forth in the defendant's answer. [86]

The statute and bond in question are contracts between the Government and the Railroad. Any breach on the part of the railroad must necessarily, in my opinion, be a breach such as reasonably could be considered as arising from the contract. There are so many examples where loss of life or destruction of property would arise under circumstances that certainly were not contemplated when the statute was passed and the bond given.

It is urged that there is only one issue here and that is the question of damages.

For instance, if an Indian decided to commit suicide and threw himself in front of an approaching train and was killed, or if an Indian decided to wreck a train and placed his automobile on the

track for that purpose, or, as suggested by the defendant, if he drove deliberately on the railroad track immediately in front of an approaching train where he had a plain and unobstructed view and the signals were being sounded, and a great many other examples which might be given,—could it be said that the railroad Company would have no defense. It appears to me that proximate cause should be a defense in this action and I feel sure that after a careful study of the Ninth Circuit Court's opinion, they have not decided this question.

This Court is bound by the decision of the Circuit Court of Appeals and I wish to adhere to their ruling [87] to the letter, but the question before me on this Fourth defense, I am sure, was not in contemplation at the time that decision was rendered, nor have they passed upon this question in any way. So for the present at least I will deny the motion to strike the Fourth defense.

Mr. Casterlin: I think that disposes of everything that is before the Court now.

The Court: Yes, as to the first four counts. Possibly there was a motion to dismiss as to the first defense, but I think that was disposed of, if there was such a motion, however, I will overrule it to make the record clear at this time.

(Opening Statement of Plaintiff.)

The Court: Before we start on the testimony we will take a short recess. (Admonition to the jury and a ten minute recess ordered.)

11:15 A. M. October 18, 1943

The Court: You may call your first witness:

## LEON M. HENRIE

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Casterlin:

Q. State your name?

A. Leon M. Henrie.

Q. And your residence. [88]

A. Fort Hall, Idaho.

Q. Your occupation or business.

A. Chief Clerk of the Fort Hall Indian agency and acting superintendent.

Q. Mr. Henrie, do you know whether or not Ninip Toane and Helen Toane are Indians?

A. Yes sir.

Q. Are they? A. They are.

Q. Do your records disclose to what tribe or tribes they belong, Mr. Henrie?

A. Yes, I have the records here.

Q. And to what tribe did Ninip Toane belong?

A. The Shoshone-Bannock tribe.

Q. When was he born?

A. 1885 I believe.

Q. Is that what your records show?

A. Yes sir.

Q. Does it show the month and date of his birth? A. I don't have the month or date.

Q. Just the year. A. Yes, just the year.

Q. Did Ninip Toane have an allotment number?

A. Yes sir.

Q. What was that number? A. 1592. [89]

Q. What does that signify?

(Testimony of Leon M. Henrie.)

A. That signifies that he was allotted a tract of land within the Indian reservation.

Q. What does the word allotted mean?

A. It means that he was allotted a parcel of land.

Q. That was true during the month of October 1941?

A. Yes.

Q. And was he under the jurisdiction of the Superintendent of the Fort Hall Indian Reservation?

A. Yes sir.

Q. Does that record show to what tribe Helen Toane belonged?

A. The Shoshone-Bannock tribe.

Q. When was she born?

A. 1885 also.

Q. Does she have an allotment?

A. Yes sir.

Q. What was her allotment number?

A. 815.

Q. Was she under the supervision of the Fort Hall Indian Agency in October 1941?

A. Yes sir.

Q. Does your record carry the name of Frank Poewee?

A. Yes sir.

Q. Does it show to what Tribe or Tribes he belongs?

A. The Shoshone-Bannock tribe.

Q. When was he born? [90]

A. January 15, 1914.

Q. Did he have a number.

A. He had. He had an identification number, but not an allotment number, which I have here. His number was 174, I am not sure that is what

(Testimony of Leon M. Henrie.)

you want. That number 174 is just the file number and used as an identification number as well.

Q. Do you have the census book with you.

A. I didn't bring that in. I brought the individual files, I thought they were a little easier to carry. I don't see any other number except that one number 174.

Q. I want his annuity number.

A. I may be able to find it. I will look.

Q. Is Frank Poewee carried on the census roll of the Fort Hall Agency?      A. Yes sir.

Q. Was he in October 1941?      A. Yes sir.

Q. Do you know where he lived during the month of October 1941?

A. On the reservation, I am quite certain.

Q. Do you know where he lived?

A. No sir.

Q. Do you know where Ninip Toane and Helen Toane lived in October 1941?      A. No. [91]

Q. Do you know where their lands are situated?

A. Our records would show that but I don't know off-hand.

Q. Did you look to see where it was located?

A. No sir.

Q. Have you been to their places?

A. No sir.

Q. Do you know where Tom English lives?

A. No sir.

Q. Do you know where Sam Tendoy lives?

A. No sir.

Q. Do you know whether Helen Toane and Ninip

(Testimony of Leon M. Henrie.)

Toane were restricted or unrestricted Indians in October 1941?      A. Restricted Indians.

Q. Do you know anything about the funeral of Ninip Toane and Helen Toane?

A. No sir, I wouldn't know that.

Q. Or the expenditures on account of that?

A. No sir.

Q. You were served with a subpoena which required you to bring with you the records showing the property of Helen Toane and Ninip Toane and Frank Poewee during the month of October 1941. Do you have that record with you?

A. Yes, I think so. I have their allotments, that is, of Ninip Toane and Helen Toane. I can tell you what those [92] allotments were, would you like the legal descriptions?

Q. Yes.

A. Ninip Toane was the east half of the southeast quarter of the Northeast quarter of section 16, Township five South Range 34 east Boise Meridian.

Q. Does that land lie within the exterior boundaries of the Fort Hall reservation?

A. No, it is within the Interior boundary of the reservation.

Q. Well, does that land lie within the Fort Hall Reservation?

A. Yes, and lots 3 and 4 and then also the south half of the northwest quarter of section 4 township 7 south range 32 and the entire allotment contains 173.24 acres.



(Testimony of Leon M. Henrie.)

Q. Does that lie within the exterior boundaries of the Fort Hall reservation? A. Yes sir.

Q. That is all the Ninip Toane allotment?

A. Yes sir.

Q. Now the Helen Toane Allotment?

A. The east half of the Northeast quarter of the Southeast quarter of Section 16, township 3 south Range 35 E B M and the southeast quarter of Section 25 Township 2 South Range 37 E B M.

Q. Do you know whether that land lies within the exterior boundaries of the Fort Hall Indian Reservation? A. Yes sir.

Q. Does it? [93] A. Yes sir.

Q. Does Frank Poewee have land allotted to him? A. No sir.

Q. During the recess if you will find the annuity number of Frank Poewee and have it with you after the recess. A. Yes sir.

Q. Do you have with you the record of the hospitalization of Frank Poewee in the hospital on the reservation? A. Yes sir, I have that.

Q. Will you get that?

A. Yes sir, and I will get that annuity number.

Q. Will you get that hospitalization record that you are looking for now?

A. Yes sir, I have it.

The Court: What do you want him to do with it?

Q. Will you hand it to me?

A. I don't have it right now, but I am sure that I ran across it when I was getting these files ready to bring in here.

(Testimony of Leon M. Henrie.)

The Court: We will recess until 1:30 and the witness can get what you want during that time.

(Admonition to the jury.)

1:30 P. M. October 18, 1943

LEON M. HENRIE,

recalled. [94]

Q. Now, Mr. Henrie, can you tell us the annuity number of Frank Poewee? A. Yes sir.

Q. What is it? A. 1161.

Q. What do you mean by an annuity number?

A. That is the official number on the census record.

Q. Are all three of those Indians; Helen Toane, Ninip Toane and Frank Poewee wards of the United States Government? A. Yes sir.

Q. Do you have the hospital records for the Fort Hall hospital? A. Yes sir.

Q. Does that show that Frank Poewee was hospitalized at the Fort Hall Hospital?

A. Yes sir.

Q. What date did he enter the hospital?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

Q. Is that record a part of the official records of the Fort Hall agency? A. Yes sir.

Q. From that record are you able to tell when he entered the Agency hospital? [95]

A. Yes sir.

(Testimony of Leon M. Henrie.)

Q. When? A. November 11, 1941.

Q. Does it show when he left the hospital?

A. Yes sir.

Q. When did he leave?

A. On November 24, 1941.

Q. Do your records disclose the cost of keeping a patient in the hospital at the Agency?

A. \$3.50 per day per patient.

Q. Do you have in your record anything concerning the expenditure for the funeral of Ninip Toane?

A. Yes sir, I have some figures on that.

Q. And the funeral of Helen Toane.

A. Yes sir.

Q. Is that a part of the official records of the Fort Hall Indian Agency? A. Yes sir, it is.

Q. Does it disclose the amount of money expended by the agency for food which was used at the Ninip Toane and Helen Toane funeral?

Mr. Thompson: Objected to as hearsay and irrelevant. Not the best evidence and no proper foundation has been laid. [96]

The Court: I don't think the question calls for any information, it was simply whether he had such a record. He may answer whether he had or not.

A. I have some records covering the funeral expenses.

Q. And what do those records consist of?

A. What do they consist of.

Q. Yes,—not the items, but of what does the record consist?

(Testimony of Leon M. Henrie.)

A. The records consist of the individual accounts, the Indian's name and the accounts at the agency office, showing the expenditure of certain amounts.

Q. Those amounts were paid for by the Agency or not?

Mr. Thompson: That is a leading question.

The Court: Yes, it is somewhat leading but he may answer.

A. They were.

Q. With what?

A. Paid through the agency.

Q. How much does your record disclose was paid for food for the funeral of Ninip Toane and Helen Toane by the agency?

Mr. Thompson: Objected to for the same reasons and the further reason that food is not a proper burial cost or burial expense, nor is it one authorized by law. When I say for the same reasons I mean the reasons set forth to the question as to the funeral expenses by way of food, asked before. [97]

Mr. Casterlin: If I may withdraw this witness I will prove the Indian custom at funerals.

The Court: You may withdraw the witness.

Mr. Casterlin: I now offer Willie Edmo as an interpreter. My next witnesses will need an interpreter.

(Interpreter sworn)

## ADELIA TOOTATH WEISER,

being called as a witness on the part of the plaintiff,  
after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Casterlin.

Q. Please tell us your name?

A. Adelia Tootath Weiser.

Q. How old are you?

A. She doesn't know her age.

Q. Does she know about how old?

A. She is referring to this Nez Perce War that took place some time ago. She was a grown woman at that time.

Q. Do you know the custom at Indian funerals?

A. Yes, sir.

Q. Is it or is it not the custom to have food at Indian funerals?

A. She doesn't know anything of that kind.

[97-A]

Q. Do you know whether or not it is the Indian custom to have mourners?

A. Yes, sir.

Q. At an Indian funeral?

A. Yes, sir, that is right that is their custom.

Q. How long does an Indian funeral service last?

A. Anywhere from four days.

Q. Do you know how long the funeral of Ninip Toane and Helen Toane lasted?

A. She only knows of the three days that the bodies was taken to the place. This lasted three days but she doesn't know how many days was held here.

(Testimony of Adelia Tootath Weiser.)

Q. During the three days was there any food consumed by the family or their friends?

A. Yes sir, there was some food and meat that was bought by the relations out there.

Q. Do you know what the meat was?

A. She doesn't know but the men folks were the ones buying the meat.

Q. Is it or is it not the custom at Indian funerals to furnish moccasins, vests, shirts, pants and things of that kind for the dead people?

Mr. Thompson: Objected to as immaterial. [98]

It is the custom to furnish shrouds for white people but it is not proper as a funeral expense.

The Court: I will permit the answer at this time, however, I will take the matter under advisement.

A. That is their custom.

Q. Do you know whether any of these things were furnished at the funeral of Helen Toane and Ninip Toane?

A. She remembers of her daughter's funeral, at the time of the funeral she had this tooth and shell dress, elk tooth and shell dress and some blankets, moccasins, belts. That is what she remembers at the funeral.

Mr. Thompson: Is it understood that I have objections to this line of questions?

The Court: Yes, it may be so understood.

Q. Do you know what the elk tooth and shell dress cost?



(Testimony of Adelia Tootath Weiser.)

A. She knows that it is not elk teeth, but shells but she doesn't know the value of the dress.

Q. Does she know the value of the moccasins?

A. She says she had the moccasins that she made up her own self before she died, but she didn't put any value on them.

Mr. Casterlin: That is all at this time.

The Court: At this time the Court will [99] strike the answers pertaining to any value of any gifts given by her or others for burial purposes here. I think the question here is only a question of custom and not of gifts given. They would not be entitled to recover for them.

Mr. Thompson: No questions.

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## LEON M. HENRIE

Recalled

Direct Examination—(Continued)

By Mr. Casterlin:

Q. Will you tell us from your records which are the records of the Fort Hall Indian Agency, the amount of money that was expended by the agency for food used and consumed at the funeral of Helen Toane and Ninip Toane?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial and hearsay and no proper foundation is laid and it is entirely without the proper measure of damages.

The Court: I don't think the proper foundation

(Testimony of Leon M. Henrie.)

has been laid as to the reasonableness of the expenditures unless you intend to connect it up. I think that it should be shown that the amount of the expenditure was within the custom of the Indians. I think, however, in order to save time I will allow this witness to answer.

Mr. Casterlin: I will show that. I will [100] have this witness step aside.

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### LIZZIE POKIBRO

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Casterlin:

Q. Lizzie, did you understand what the Clerk said when you were sworn?

A. Yes, I understood what he said.

Q. And do you swear to that? A. Yes sir.

Q. Were you acquainted with Ninip Toane and Helen Toane during their lifetime?

A. Yes, they were my neighbors.

Q. Do you know how long Ninip Toane's and Helen Toane's funeral lasted?

A. About four days, I didn't attend the last day, during the three days there were quite a number of people there, but I wasn't there on the fourth day.

Q. How many were there when you did attend the funeral?

(Testimony of Lizzie Pokibro.)

A. The three days I attended there was about two hundred.

Q. Whether or not it was conducted according to the Indian custom?

A. Yes sir, like Indians do. [101]

Q. Is it the custom to furnish food for the mourners and their friends?

A. Yes sir, it is the Indian custom.

Q. Do you know what food was furnished at Ninip and Helen Toane's funeral?

A. Yes sir.

Q. What was it?

A. Meat, some fruit, tomatoes, bread, vegetables, potatoes and corn.

Q. Do you know how much meat was used at the funeral?

A. I don't know but there was quite a lot. They killed one whole beef or a couple. I didn't ask but there was quite a lot of meat.

Q. At a funeral of that size would it be reasonable to use one, two, three or four beeves?

Mr. Thompson: Objected to as leading.

The Court: Sustained.

Q. How many beeves would be consumed at a funeral of this kind? A. About two.

Q. About how much would be expended for fruit, vegetables and other things that you and the others ate at the funeral, or at a funeral of this size, what would be reasonable?

Mr. Thompson: Object to that as incompetent, irrelevant and immaterial under any circumstances

(Testimony of Lizzie Pokibro.)

[102] because if there were expenditures made this is not the proper way to prove them. To establish what is the usual expenditure is not the measure of damages, or a proper measure of damages, but the measure is what is the proper expenditure here. I am not able to make any more definite objection at this time.

The court: Without any comment I will permit her to answer.

Q. Now, Lizzie, tell us what would be a reasonable amount for food for the number of people at the funeral, taking into consideration that the funeral lasted for four days.

A. May I ask, is it for stuff like groceries?

A. Yes, for groceries and things of that kind, and fruit and vegetables, not including the beef.

A. I would say about a hundred dollars.

Mr. Casterlin: That is all, you may inquire.

Mr. Thompson: No questions.

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LEON M. HENRIE

Recalled.

Direct Examination—(Continued)

By Mr. Casterlin:

Q. Do the official records of the Fort Hall Reservation disclose how much was spent for fruit, groceries and supplies, excluding the meat, for the Ninip Toane and the Helen Toane funeral?

A. Yes sir. [103]

(Testimony of Leon M. Henrie.)

Mr. Thompson: I object to that,—first I assume that our general objection is overruled, and I object for the further reason that according to the Bill of particulars some of this was furnished by one, and some another and it is my belief that these items rest on different basis. I should be given an opportunity to object to the various expenditures by the various persons.

Mr. Casterlin: I will withdraw the question.

Q. Was this money which was expended for food exclusive of beef for the Toane funeral, paid out by the agency?      A. Yes sir.

Q. Was it paid on the account of one or more individuals?

A. On the one individual account.

Q. Did this expenditure which was charged to one individual's account cover items furnished by others than that particular individual?

Mr. Thompson: Object to that as the record would be the best evidence. No proper foundation is laid.

Q. Tell us how this bill was paid? Let's see if we can get it straightened out so that a railroad attorney will understand it.

Q. These bills was paid from the account of Ninip Toane upon presentation by the leading heir.

A. Who was that? [104]

A. Irving Toane.

Q. They were paid upon his presentation?

A. Upon him bringing in receipts for the materials.

(Testimony of Leon M. Henrie.)

Q. Do you have receipts for these goods?

A. Yes sir.

Mr. Casterlin: We ask to have these marked as exhibit 1 for identification.

Q. Was the money in payment of all the items included in this exhibit marked one for identification paid out of the funds of the estate of Ninip Toane?

Mr. Thompson: We will admit that they were.

Mr. Casterlin: We now offer exhibit 1 and 1a.

Mr. Thompson: That is a total of \$63.00.

Mr. Casterlin: \$63.28.

Mr. Thompson: The only objection I have is the objection that I have been having as a standing objection.

The Court: The exhibits may be admitted.

Q. Mr. Henrie will you tell me what the total of these receipts is?      A. \$63.28.

Q. You said something about the chief heir of Ninip Toane, who is that? [105]

A. Irving Toane.

Q. Do you know whether or not there were any other children born to Ninip Toane and Helen Toane?

A. Our records show that there were five children born but died in infancy and that Irving Toane is the only one living.

A. He was born in what year?

A. He was born in 1915.

Q. Is he married or single?      A. Married.

Q. Is his wife still living?      A. Yes sir.



(Testimony of Leon M. Henrie.)

Q. Do they have children?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

A. Is Irving Toane still living?

A. I believe so.

Mr. Casterlin: You may take the witness.

### Cross Examination

Mr. Mr. Thompson:

Q. You said that the bill of \$63.28 was paid out of the account of Ninip Toane. I infer from that, that even before his death you carried an account with him on the books of Fort Hall?

A. Yes sir. [106]

Q. What was the purpose of that account?

A. That was his bank account.

Q. So that he had more money than \$63.28 when you paid that out of his account.

A. I wouldn't say that.

Q. Don't you know what his bank account was?

A. Not at that time. That might have been future money coming in on his year's income.

Q. Do you know what his income was for that year?

A. I think I have it written down here somewhere, it will take a minute to find it, but I think I have it.

Q. We will pass that since you have to look it up. What did he derive his income from?

A. I think he had some cattle interest, and some leased land.

(Testimony of Leon M. Henrie.)

Q. Do you know the extent of his ownership of cattle?      A. I cannot answer that exactly.

Q. He had more than two beef cattle?

A. I wouldn't know, but I can answer your income question, according to my record.

Q. But you didn't make a record and you have no knowledge of what they are made up of?

A. No, I didn't.

Q. Concerning his land, what kind of land was that,—how much was irrigated? [107]

A. I think 20 acres was irrigable and 160 acres grazing or dry farming.

Q. That was likewise true as to the land holdings of his wife?      A. Yes sir.

Q. Mr. Casterline spoke of it as their land, now, subject to certain limitation they were the owners of the land, subject to guardianship.

A. Yes sir.

Q. What did you do with that land on the books in such cases as this, where the parents die, with respect to the land passing on the books of your office in Fort Hall?

A. The title goes to the determined heirs.

Q. In this case it would be Irving Toane.

A. In the case of Irving Toane he inherited all of Ninip Toane, and,—yes, I can tell you,—Helen Toane, anything she owned went to Ninip Toane and Adelia Weiser and all of Ninip Toane's went to Irving Toane as the sole heir.

Q. Irving Toane had an allotment of his own didn't he?      A. I think not, no sir.

(Testimony of Leon M. Henrie.)

Q. He had land upon which he lived and occupied didn't he? A. Yes sir.

Q. How much was that, and what was it?

A. I cannot answer that, I don't know.

Q. You know he claimed agricultural deferment in the draft? [108]

Mr. Casterlin: You know he is in the army now Mr. Thompson.

Mr. Thompson: Yes, and I know why, shall I develop it?

Mr. Casterlin: I object to the question as immaterial.

The Court: Sustained.

Q. Now, getting to Frank Poewee, you testified concerning him did you not? A. Yes sir.

Q. Do you know where he lives with reference to Fort Hall? A. No sir.

Q. With reference to the agency? A. No.

Q. Do you know that he has a parcel of land upon which he lives and has lived for a number of years? A. No sir, I don't know that.

Q. Were you asked to bring his account or to be prepared to show what he owned?

A. I think not.

Q. You spoke about an annuity number 1161 allotted to Poewee I believe, what does an annuity number mean?

A. It is the official number under which they are carried on all census rolls and records, especially where they are not allottees. [109]

(Testimony of Leon M. Henrie.)

Q. What does it apply to if it is not their allotment? A. It is primarily the census.

Q. That is, he is Indian number 1161.

A. Yes sir, on the Fort Hall reservation.

Q. That is all they signify as far as you know?

A. Yes sir.

Q. How long have you been there at Fort Hall?

A. About two years.

Q. Then you had nothing to do with any of these entries that you have been testifying to, or the making of any of these records?

A. Not personally, no sir.

Q. That is what I asked, personally.

A. No sir.

Mr. Thompson: That is all.

Mr. Casterlin: That is all.

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## HELEN YOUNG

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Casterlin:

Q. Helen Young is your name? A. Yes sir.

Q. You live in Pocatello? [110]

A. Yes sir.

Q. You are a registered nurse?

A. No sir, I am the bookkeeper at the General Hospital.

(Testimony of Helen Young.)

Q. As such bookkeeper do you have access to the official records of the hospital? A. Yes sir.

Q. That is the Pocatello General Hospital?

A. Yes sir.

Q. Did you find in such records, any record concerning Frank Poewee, during the month of October 1941? A. Yes sir, and November.

Q. Does that record disclose that he was or was not hospitalized during that month?

A. He was hospitalized for six days.

Q. When did he enter?

A. On the 29th of October.

Q. That was what year? A. 1941.

Q. He left when?

A. The 4th of November.

Q. 1941? A. Yes sir.

Q. Does that record disclose the expense of his hospitalization? A. Yes sir.

Q. What was that? A. \$34.30. [111]

Q. Has that been paid.

A. Yes sir, paid by the Agency.

Q. Is that his clinical record (indicating).

A. I have the financial record and the hospital record, the clinical record.

Q. Does that clinical record show why he was hospitalized?

A. Shows why he was hospitalized.

Q. Will you tell us what the clinical record shows?

Mr. Thompson: I suggest that the record is the

(Testimony of Helen Young.)

best evidence, and her statement would be hearsay.

The Court: That is correct.

Mr. Casterlin: We now offer in evidence plaintiff's exhibit 2 with the understanding that a copy of it may be made and substituted for the original.

Mr. Thompson: No objection.

The Court: Admitted.

Mr. Casterlin: I will read this exhibit into the record at this time.

Name: Mr. Frank Poewe; Fort Hall, Idaho.  
Age 27.

Doctor: Olsen.

Working Diagnosis:

1. Cerebral contusion.
2. Shock.
3. Contusion of eye and scalp. [112]
4. Laceration of right arm.
5. Contusion of abdomen.
6. Fracture 12th rib.
7. Contusion of back.

Complications: X-ray fracture of twelfth rib right, much intra abdominal gas, suggestive of shock or abdominal injury.

Admitted 10-29-41. Discharged 11-4-41.

Medical. Treatment: Important points. 1. Bloodcount. 1. Uninanalysis Condition of discharge: Improved.

Mr. Casterlin: That's all; you may take the witness.



(Testimony of Helen Young.)

Cross Examination

By Mr. Thompson:

Q. Have you records which indicate who the attending physician was?

A. Yes, sir; Dr. Olsen.

Q. What are his initials?

A. I don't recall.

Mr. Casterlin: I will agree that it was Dr. W. L. Olsen who was the Agency and the Railroad Company Doctor.

Mr. Thompson: That is all.

Mr. Casterlin: That is all, thank you. [113]

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ADELIA TOOTATH WEISER

Recalled.

Mr. Casterlin: May it be agreed that she was and is the same witness who was sworn before and testified in this trial.

Mr. Thompson: Yes.

Q. Are you related to Helen Toane?

A. Yes, she is the Mother of Helen Toane?

Q. How long did Helen Toane live with you before she was married?

A. She doesn't remember what year that she lived with her, it wasn't very long and after that she married Ninip Toane.

Q. After Helen Toane married Ninip Toane did she visit with her Mother?

A. Yes, she has visited me often.

Q. How far do you live from Helen Toane's home?

(Testimony of Adelia Tootath Weiser.)

A. It is quite a ways from her place. She says she doesn't know what a mile is. She cannot tell what a mile is.

Q. Did Helen Toane visit you at any time up to the time of her death?

A. Yes, she visited me about three or four times before this accident happened. She was telling me she was going after wood.

Q. Did Helen ever contribute or give you anything to live on, or any money, or food?

A. She has contributed some money and food.

Q. How often would she give her money and how often would [114] she give her food?

A. Well, it is,—there is a certain period she didn't give much in them days, not often.

Q. Did Ninip Toane give you anything like money or food or support?

A. No sir, he never.

Q. Do you know Clinton Bear?

A. Yes sir, that is my son.

Q. Do you know Lillie Nagitsy?

A. Yes, she knows her.

Q. Are you any relation to Lillie Nagitsy?

A. Yes, my daughter.

Q. Do you know Mrs. John Nena Tendoy?

A. That is my oldest daughter.

Q. Did Helen Toane, Clinton Bear, Mrs. John Tendoy all have the same Father?

A. She says these three, I suppose she means Lillie Nagitsy, Mrs. John Tendoy and Clinton have

(Testimony of Adelia Tootath Weiser.)

the same father but Helen Toane she has another father.

Q. Do you remember when Helen Toane died?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

(No ruling.)

A. She doesn't know, she thinks it is about three years.

Q. Did you attend the funeral?

A. Yes sir. [115]

Q. Have you missed Helen Toane since her death?

Mr. Thompson: Objected to as incompetent, irrelevant, and immaterial. The only measure of damage is the pecuniary damage.

The Court: Objection sustained. If counsel cares to present authorities later I will hear you.

Q. Do you know how much money Helen Toane would give you each year?

Mr. Thompson: Objected to as leading.

The Court: I think it is leading.

Q. Do you know how much money Helen Toane gave all together during her lifetime?

A. She don't know exactly, maybe better than a hundred dollars. She really doesn't know.

Q. Do you know how much food Helen Toane gave you when she was alive?

A. Sometime she buys her about twenty dollars worth of groceries and sometimes she buys her a shawl.

(Testimony of Adelia Tootath Weiser.)

Q. How often would she buy you food?

A. Sometime it would be two weeks about, other times it would be a longer period than that.

Q. Sometime it would be two weeks?

A. Yes.

Q. Could you tell us about how many times a month or a moon [116] Helen Toane gave you food?

A. She said about every two months sometimes.

Q. Did this continue or last since she married Ninip Toane, or was it just part of the time,—did this last all of the time after she married Ninip Toane or part of the time after Helen Toane married Ninip Toane?

A. She said when she was small I used to provide her groceries and after she grewed up she helped provide groceries for me.

Q. Are you married now?

A. Yes, to Sam Weiser.

Mr. Casterlin: I think that's all, you may take the witness.

### Cross Examination

By Mr. Thompson:

Q. Does the witness have any land or cattle?

A. She has no cattle but she has land.

Q. Is some of that land irrigated or watered?

A. Part of it has got water.

Q. Does her husband have some land and cattle?

A. Her husband has land but no cattle.

Q. How much of that land is irrigated or watered?

(Testimony of Adelia Tootath Weiser.)

A. She says part of her allotment is watered but she doesn't know the acreage, but a certain irrigable tract is not watered. [117]

Q. I asked about her husband?

A. His land is about the same way as hers.

Q. How does she get her groceries to eat and live on now?

A. She says she sews up some buck-skin, and she gets,—I believe she is referring to this old age pension every month.

Q. Who does she get this old age pension from?

A. She doesn't really know where this pension money comes from.

Q. She gets everything she needs?

A. She gets along fairly well on the pension.

Q. Before Helen Toane died how did she get things to eat when Helen Toane didn't give it to her?

A. She says she has been doing a lot of Buck-skin work and that is how she provides her own living.

Q. She got a pension from the Government before Helen Toane died?      A. Yes sir.

Q. What does her husband do for a living, how does he get money and food and so on?

A. He does a little farming.

Q. Does he get a pension too?

A. He used to get some kind of a pension but somehow it has been cut off.

Q. Does she know who cut it off?

A. She doesn't know that. [118]

(Testimony of Adelia Tootath Weiser.)

Q. Does she get her pension from the Agency?

A. That is where she gets it.

Q. Mr. Thompson: That is all.

Mr. Casterlin: Yes, that is all.

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DR. W. L. OLSEN

Being called as a witness on behalf of the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Your name is Doctor W. L. Olsen?

A. Yes sir.

Q. You reside here?           A. Yes sir.

Q. Resided here in October 1941?

A. Yes sir.

Q. At that time did you have any connection with the Fort Hall Indian Reservation?

A. I was consulted by Doctor Dewey who was then Agency physician when he wanted assistance in taking care of a patient.

Q. Did you have a retainer from the Agency?

A. No, sir, on a fee basis.

Q. Were you physician and surgeon for any other institution in this County? [119]

A. The Union Pacific Railroad Company and the Oregon Short Line.

Q. Were you called in October 1941 to attend one Frank Poewee?           A. Yes sir.

Q. When was that?           A. October 29, 1941.



(Testimony of Dr. W. L. Olsen.)

Q. What were the circumstances?

A. Doctor Dewey called me at my home, saying that he was bringing an Indian in to the General Hospital who had been injured in a train accident and would I come in and see the Indian with him, so I did.

Q. What Indian did you find there?

A. Frank Poewee.

Q. At that time did you make a physical examination of Frank Poewee? A. Yes, I did.

Q. Prior to that time you knew that he had been brought in as a result of an accident?

A. That is what Doctor Dewey told me.

Q. Could you talk to Frank Poewee at that time? A. Not at that time.

Q. Did Doctor Dewey tell you how and where this accident had taken place? A. Yes sir.

Q. What did he tell you?

A. That the train and an automobile had collided at Fort Hall on a crossing. [120]

Q. Did you make an examination of Frank Poewee to ascertain the injuries which were attributable to this accident, directly or indirectly?

A. Yes sir.

Q. What did you find as a result of your examination?

Mr. Thompson: Just a minute,—no, I will withdraw any objection that I might have.

Q. What did your examination disclose as to his condition? What did you find his condition

(Testimony of Dr. W. L. Olsen.)

to be as a result of this accident, what was attributable, directly or indirectly, to this accident?

Mr. Thompson: We object to this as calling for a conclusion of the witness.

The Court: Yes, I think you can ask what his condition was.

A. You mean the injuries?

Q. Yes. A. May I refer to some notes?

Q. Yes.

A. I took these from the hospital records. He was unconscious or semi-conscious and in shock. His pulse was very weak, blood pressure low; contusion about the right ear; concussion and he had cuts and lacerations of the right arm and about the nose; bruises about the lower part of the abdomen; bruises in the lower portion of his back; he had a fracture or break of the last rib on the right side. [121]

Q. What was the abdominal condition. You mentioned a condition of the abdomen. What was that?

A. He had bruises; he was tender, some of these things I discovered later. The man was unconscious when I first saw him.

Q. How many times did you visit him?

A. Twice daily during the time he was in the hospital.

Q. These findings were developed over that period?

A. Yes, sir.

Q. What was the abdominal condition?

A. He was tender to pressure. He was some-

(Testimony of Dr. W. L. Olsen.)

what black and blue in subsequent days after he had been there two or three days.

Q. During this time was there any abdominal gas?      A. I don't know what you mean.

Q. Did this injury to the abdomen cause any gaseous condition?

A. He complained of pain during the time but he had no especial disturbance of the abdominal functions.

Q. Was the abdominal wall punctured at any place?      A. No sir.

Q. Explain the condition of the right arm.

A. He had several superficial cuts, not very bad, in the skin of the right arm.

Q. Where were those on the arm?

A. Between the elbow and the shoulder. On the upper arm.

Q. What about the nose? [122]

A. Superficial cuts through the skin.

Q. No fracture of the bones?      A. No sir.

Q. What about the condition of the right eye?

A. Soft tissue injury. You and I would commonly call it a black eye.

Q. Was his vision effected?      A. No sir.

Q. Just what we would call a black eye?

A. Yes sir.

Q. What about the scalp?

A. He had bruises about the scalp on the right side. Black and blue areas with some swelling.

Q. Cuts?

A. Superficial abrasions but no cuts.

(Testimony of Dr. W. L. Olsen.)

Q. You mentioned that he was semi-conscious after this?      A. Yes sir.

Q. After examining his head and the bruises about the head are you able to say as a physician and surgeon, what caused that semi-consciousness?

A. I think so.

Q. What was it?

A. The result of a injury he sustained about his head. What we call a concussion of the brain. Injury resulting in loss of consciousness. A semi-conscious state without any subsequent brain damage. [123]

Q. No subsequent damage to the brain in this case?      A. Not so far as I could see.

Q. What about the shock?

A. When the man came in he was very pale, his pulse was quite rapid and quite weak; his blood pressure low and he was semi-conscious. If you would attempt to move him about he would object to being moved in bed. He would not respond to questioning, but he did respond to painful manipulation.

Q. Did that condition progress or retrogress?

A. It retrogressed. The next morning he wanted to eat.

Q. What about the back injury?

A. He had bruises across the lower portion of the back, what we call the tail-bone, when he was moved he would say it would hurt his back. This complaint subsided to the point that when he left

(Testimony of Dr. W. L. Olsen.)

about seven days later he was able to leave in a wheel chair and ride in an automobile to Fort Hall.

Q. When you were first called what have you to say respecting his ability to move?

A. He was unconscious. He didn't move unless he was hurt. When I attempted to examine his abdomen and pushed firmly where these injuries were he would squirm and move.

Q. After he became conscious what have you to say respecting his free movement? [124]

A. He was able to feed himself and he was able to move about in bed from side to side. With the assistance from the nurse he was able to be put on the bed-pan.

Q. What about his lower extremities?

A. He was able to move them about without a great deal of pain.

Q. Could he move his legs voluntarily?

A. Yes sir, when you hurt him during the initial examination he moved his legs about.

Q. How about the fracture of the 12th rib, was it the 12th rib?

A. We diagnosed that and our diagnosis was based upon physical evidence. When the chest was examined we noted upon pressure on the last ribs you could feel the broken ends of the bone and also a little air under the skin due to the puncture of the lower vesicle of one of the lungs.

Q. What treatment did you give?

A. Put him to bed gave him sufficient opiates to control the pain. I don't know whether we gave

(Testimony of Dr. W. L. Olsen.)

him any fluid. Kept him warm. His wounds were dressed and injuries to the head dressed with bandages. That was the extent of his treatment.

Q. How did he respond to the treatment?

A. Quite well. [125]

Q. When he left what was your prognosis?

A. Ultimate recovery.

Q. After he left the general Hospital after that seven days how did he leave?

A. In a wheel chair taken to his room. He sat in the wheel chair and was taken to the entrance and transferred to an automobile.

Q. Going from the bed to the wheel chair, how did he make that?

A. I wasn't there.

Q. After he was taken to the Fort Hall hospital did you visit him?

A. No sir.

Q. Have you had occasion to examine him since that time?

A. He came to my office last week.

Q. Did you make an examination?

A. Yes sir.

Q. What did you find as a result of your examination?

A. I asked him what bothered him and he said his back. I asked when it bothered him and he said when he got up first in the morning it was stiff. When he stooped over to lift anything heavy, sack of wheat or something like that he said it hurt him—hurt his back and he also said he had some pain on the lower right side where his rib was fractured. [126]



(Testimony of Dr. W. L. Olsen.)

Q. Based upon the history of the case and your first examination, and your knowledge as a physician and surgeon, are you able to say within the realm of reasonable certainty that the condition of which he complained when you made this last examination are the result of this original injury?

A. I think that would be a reasonable conclusion.

Q. What did you find to be his percentage of recovery on this last examination, from these injuries which you have described?

A. Well, of course, he says that he has pain when he attempts to do what I would consider heavy manual labor. I would say that if he depends on heavy physical labor for a livelihood that he would suffer a moderate amount of incapacity, whereas, if he depended on a lighter and more sedentary occupation his incapacity would not be so great.

Q. Do you think he would be qualified for office work?      A. Physically, yes.

Q. Mentally or otherwise is he qualified?

A. No sir.

Q. If he sustains himself it would be by manual labor?

Mr. Thompson: I object to that question, it is speculative.

The Court: Sustained. [127]

Mr. Casterlin: Exception please.

Q. Basing your answer upon the subjective and objective history of this case and the examination

(Testimony of Dr. W. L. Olsen.)

of Frank Poewee and your knowledge and experience as a physician and surgeon, what have you to say as to whether or not this hip injury and the pain in the back of which he complains is it or is it not permanent?

Mr. Thompson: May I examine in order to make an objection?

The Court: Yes, you may.

By Mr. Thompson:

Q. So far as this man having pain in his back is concerned you had no means of independently determining this apart from his statement, whether he had it or not? A. That is right.

Q. That was true of his hip? A. Yes sir.

Q. And any prognosis you made would be based upon what he said rather than anything you found?

A. That is true.

Q. That is true with reference to the answers you made, particularly concerning his condition or recovery? A. Yes sir.

Q. So far as you can determine from any independent examination you cannot find anything the matter from anything other [128] than his own statement?

Mr. Casterlin: Objected to as not proper examination at this time.

The Court: That is true. The objection is sustained at this time.

Mr. Thompson: Now, I object to the question asked by Mr. Casterlin, as it calls for a summation by this man of all the evidence including the state-

(Testimony of Dr. W. L. Olsen.)

ments of this man, and asks him to determine a question that is a question for the jury, we object that this invades the province of the jury.

Mr. Casterlin: I will concede that he has an objection that is good and I withdraw the question.

The Court: That saves me the trouble.

Q. What is your prognosis as to the back and hip injury?

A. Mr. Thompson: Are you basing that on knowledge of the witness or examinations made?

Q. Basing your answer upon the examination of Mr. Poewee, your testimony in this case, subjective and objective symptoms, together with your knowledge and experience as a physician and surgeon. What is that prognosis respecting the back and hip injury?

Mr. Thompson: Objected to upon the ground that he asks this witness to accept the statement of this patient and upon examinations made. [129]

The Court: I think if the objection was good to the last question it is good to this.

Q. As a result of your examination a week ago are you able to make a prognosis?

A. That includes some of the questions I asked him about what he had been doing.

The Court: Just answer that question yes or no.

A. Yes sir.

Q. What is that prognosis?

Mr. Thompson: Now, he says that it would be based upon what this man told him.

(Testimony of Dr. W. L. Olsen.)

The Court: Are you basing it upon what this man told you?

A. Yes sir.

The Court: Objection sustained.

Q. Can you give us a prognosis independent of the subjective symptoms?

A. No, I don't think I can.

Mr. Casterlin: I think that is all.

The Court: We will have a recess for 15 minutes.

3:35 P.M. Oct. 18, 1943.

Mr. Casterlin: May I ask another question?

The Court: Go ahead.

Q. Were you paid for your services in this connection? [130]

A. Yes sir.

Q. How much? A. Five dollars.

Q. Do you know where Doctor Carol W. Dewey is?

A. No sir, I don't.

Mr. Casterlin: That is all.

### Cross Examination

By Mr. Thompson:

Q. You said that when Poewee came to you within the last week that you had some conversation with him and that your answers concerning the condition at that time were based largely upon your conversations. Did you make inquiry as to what he has been doing since the time you had him in the hospital?

A. Yes sir.

Q. What did he tell you concerning his work?

A. He said he was farming.

(Testimony of Dr. W. L. Olsen.)

Q. Did he say how the farming he is doing now compared with the farming he did heretofore in previous seasons?

A. I didn't ask him the type of farming he was doing. I asked what he was doing and he said farming. I asked how he was getting along and he said pretty good.

Q. Did he say whether he had any help or not?

A. I asked if he could do his own farm work and he said yes.

Q. That rib that was fractured, what rib was that? [131]

A. The last rib on the right side.

Q. That is sometimes called the floating rib?

A. Yes sir.

Q. How near to the end was it fractured?

A. I didn't take an X-ray.

Q. But as you palpated it——

A. Yes, it was close to the attachment to the spine.

Q. What did you do, did you tape it up?

A. No sir, I kept him in bed.

Q. He showed marked improvement?

A. Yes, he did very well.

Q. You didn't think it was necessary to tape him? A. No, I didn't think so.

Mr. Thompson: That is all.

Mr. Casterlin: That's all.

FRANK POEWEE

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Your name is Frank Poewee?

A. Yes sir.

Q. Where do you reside?

A. Fort Hall, Idaho.

Q. You are an Indian? [132] A. Yes sir.

Q. Belong to what tribe? A. Bannock.

Q. Is your Father living? A. No, dead.

Q. Is your Mother living?

A. She is also dead.

Q. How long have they been dead?

Mr. Thompson: What is the materiality of this. I object as incompetent, irrelevant and immaterial.

The Court: Of course, I cannot see the purpose of this at this time, perhaps counsel has some reason for it. I think he may answer.

Q. How long have your parents been dead?

A. About twenty-eight years ago.

Q. With whom have you been living?

A. Lamar Pokibro.

Q. They are your foster parents?

A. Yes.

Q. Do you recall the month of October 1941 when an accident occurred on the Fort Hall reservation? A. Yes sir.

Q. Where had you been?

A. Up to the mountains to get wood.

Q. Who went with you? [133]



(Testimony of Frank Poewee.)

A. Ninip Toane and his wife.

Q. What time did you come back?

A. Close to six o'clock.

Q. Why did you go to the timber, why did you go up in the hills?

A. They wanted to have that wood hauled.

Q. Did you bring back a load of wood?

A. Yes.

Q. Tell us what happened as you came back?

A. On the way over we didn't talk very much. As we got to the crossing, I slowed down and shifted to the first gear. I continued on going over the track, just on this one track and then pretty soon this lady she hollered here comes a train.

Q. Did the train hit you? A. Yes sir.

Mr. Thompson: Just a minute,—I think that is what you would like to get in.

Mr. Casterlin: He answered.

Q. Did the train hit you? A. Yes.

Q. What did you do,—what do you next remember after the train hit you?

A. All I can remember is when I was sitting in the cinders facing toward the freight slowly going by.

Q. Where was the truck?

A. The truck was on the south side of the fence.

[134]

Q. Do you know where Ninip Toane was?

A. His wife was close to the freight and near by her husband was laying there.

(Testimony of Frank Poewee.)

Q. Were you conscious so you can remember what you saw?      A. Yes.

Q. Can you tell us whether Ninip Toane was alive when you saw him?

A. He was trying to get up and groaning at the same time.

Q. Was Helen Toane alive then?

A. No, she was laying still.

Q. What did you do then?

A. Tom Tyboats came over and asked if I was all right and I told him yes, I didn't know I was injured so bad.

Q. Who is Tom Tyboats?

A. He is an Indian on the reservation.

Q. After that what happened?

A. They loaded us in a little pick-up and took us to the Fort Hall agency hospital.

Q. Who do you mean when you say they loaded us up, who did they load into the pick-up?

A. Ninip and his wife and myself.

Q. Was Ninip alive at that time?

A. He was groaning, and that is about all I know.

Q. Was Helen alive at that time?

A. No. [135]

Q. Where did they take you then?

A. From the agency the employees took me to the General Hospital in town here.

Q. After the train hit you how did you feel?

A. When I got over to the agency hospital I

(Testimony of Frank Poewee.)

went toward the steps and I couldn't climb the steps because of my leg.

Q. What was the matter with your leg?

A. Something wrong with my hip.

Q. Did you have any pain at that time?

A. Yes.

Q. Where?

A. Back and of course the broken hip and my leg.

Q. How about the head?

A. Kind of a little bump on the right eye.

Q. After you were there at the agency hospital what was done?

A. They stuck a needle in me before going to the General Hospital.

Q. After they stuck the needle in you what do you remember?

A. I guess I went to sleep after that.

Q. What do you next remember?

A. All I remember was in the hospital in bed.

Q. What were your feelings then, just tell the jury how you felt in the hospital?

A. Well, my back was sore at that time and my leg and I couldn't hardly lift it. When they washed my body my [136] right leg hurt.

Q. Anything else that you remember?

A. Of course I got a little scratch on my right arm.

Q. Anything else?                      A. Black eye.

Q. Which eye?                      A. Right eye.

Q. Anything else?                      A. Bruises on the back.

(Testimony of Frank Poewee.)

Q. Where on the back?

A. Below the right ribs.

Q. Anything else you noticed about yourself?

A. I know I have a broken rib.

Q. Was there anything else you noticed about yourself, do you recall anything else?

A. As near as I remember my hurts, that is about all I remember.

Q. Do you remember how long you stayed in the hospital in Pocatello?           A. About a week.

Q. Where did you go then?

A. They transferred me to the Agency Hospital.

Q. How did you get from the Pocatello Hospital to the Agency hospital?

A. Doctor brought me over. [137]

Q. How did the Doctor take you over?

A. In a car.

Q. How did you get from the hospital to the car?

A. On a wheel chair.

Q. How did you get from the bed to the wheel chair?

A. I had a little assistance from the Doctor and the nurse.

Q. On the way from the Pocatello hospital to the Fort Hall hospital, what were your feelings then?

A. I was kind of shaky.

Q. Could you walk by yourself then?

A. No.

Q. Did you have any pain and suffering at that time?           A. My leg was sore.

(Testimony of Frank Poewee.)

Q. Do you remember whether or not they stuck a needle into you more than once?

A. Just once, that was at the agency hospital.

Q. When you arrived at the agency hospital how did you get from the car to the hospital?

A. I got a little assistance from the Doctor and the nurse.

Q. What was done with you then?

A. I was put in a bath tub to be washed and put to bed.

Q. Were you able to give yourself a bath or did someone give you a bath?

A. I washed myself.

Q. How did you get from the bath tub to bed?

[138]

A. I got a little assistance from the attendant.

Q. How long did you stay in the hospital at Fort Hall?

A. I got out the 20th I think.

Q. The 20th of what month?

A. November.

Q. Where did you go then?

A. I asked some people to haul me over to the house.

Q. *Who* house is that?

A. Lamar's house.

Q. Your foster parent?

A. Yes sir.

Q. During the time you were in the Fort Hall hospital did your condition change any?

A. Just a little.

Q. For the better or worse?

A. Better, but I couldn't hardly walk very good.

Q. When you left the Fort Hall Hospital what was your condition? How did you feel?

(Testimony of Frank Poewee.)

A. Well, my leg was kind of sore from my hips and over my back.

Q. How did your head feel?

A. My head feels all right.

Q. When you went over to Lamar's place what did you do then?      A. I went to bed.

Q. How long did you stay in bed at that time?

[139]

A. About a week.

Q. Then what did you do?

A. Got up and took exercise.

Q. Did you do any work around the place?

A. No I couldn't do any work.

Q. Lamar lives on a ranch?      A. Yes sir.

Q. How far from Fort Hall?

A. About three miles and a half.

Q. How big a place is that?

A. Just a small place.

Q. How many acres in cultivation?

A. Forty.

Q. After you got back and got out of bed what did you do then?

A. I just stayed around there and didn't do any work.

Q. For how long a time didn't you do any work?

A. Until spring about April I guess.

Q. Why didn't you do any work until April?

A. On account of my back and leg.

Q. That would be in April 1942?

A. Yes sir.



(Testimony of Frank Poewee.)

Q. When the spring work opened up in April 1942 what did you do?

A. I started to work, did light work.

Q. What work did you do during the season of 1942?

A. Discing and leveling. [140]

Q. Did you do that yourself?

A. Yes.

Q. What effect did that have on you?

A. It always give me a tired feeling.

Q. After the work was done in 1942 then what did you do in the winter of 1942? That would be last winter.

A. You mean that winter?

Q. Yes.

A. Well, in the fall I hauled wood. I didn't do much work then.

Q. When you started to haul wood in the winter of 1942 how did you feel then, when you worked?

A. I was still shaky at that time.

Q. Now, at the present time are you able to work?

A. No,—just light work.

Q. What do you mean by light work?

A. Not lifting any heavy stuff.

Q. Like what?

A. Well, just like harrowing, and discing and that kind of work.

Q. When you lift heavy objects does that have any effect on you Frank?

A. Yes.

Q. What?

A. It gives my back a pain. [141]

Q. Just describe what pain you have when you lift heavy objects of any kind?

(Testimony of Frank Poewee.)

A. Sort of feels like it is going to jerk me down when I lift any heavy object.

Q. Stand up and show the jury where that pain is.

A. Back in the small place in the back.

Q. On the right or left side?

A. The right side.

Q. The right side you say? A. Yes sir.

Q. Is that pain right there in that one place?

A. Yes sir, and of course, in the hip here (indicating).

Q. Do you feel any other effects when you do any heavy lifting?

A. No sir, just that back and leg.

Q. Do you have any property? A. Yes.

Q. What? A. Forty acres of land.

Q. Forty acres? A. Yes.

Q. How much of that forty acres is tillable?

A. All of that forty.

Q. During the years 1942 and 1943 did you raise crops on there yourself?

A. No sir, I have got it leased. [142]

Q. To whom do you have it leased?

A. Some Japanese.

Q. Prior to the time you had it leased did you work this place yourself? A. Yes sir.

Q. Since the lease have you done any work on it? A. No.

Q. Do they pay you rent? A. Yes.

Q. What rent do they pay you?

A. \$9.00 an acre.

(Testimony of Frank Poewee.)

Q. Do you have any other income?

A. No.

Q. Do you own any cattle? A. No.

Q. Do you have any sheep? A. No sir.

Q. Do you have any other property outside of this forty acres, that brings you in any money?

A. No.

Q. You said that you live with your foster parents? A. Yes sir.

Q. And have for a long time?

A. Yes. [143]

Q. How large a place do they have?

A. Lamar he has twenty acres of land and Lizzie she has about thirty acres.

Q. Twenty acres that belongs to Lamar, how much of that land do they raise a crop on?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. About sixteen or seventeen acres.

Q. And on Lizzie's land, how many acres do they use of that land, if you know?

A. She has got it leased.

Q. How much of it will raise crops?

A. All of it, the thirty acres all of it.

Q. During the time you have lived with your foster parents have you known any other parents?

A. No sir.

Q. During the time you have lived with them have you contributed anything toward their support?

(Testimony of Frank Poewee.)

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: If this was to show his contribution to them, then the objection will be sustained, but if it is for the purpose of showing his physical condition, that *is* was such that he could contribute to them, I think I will permit it. [144]

Mr. Casterlin: It is for the purpose of showing less contribution since the accident.

The Court: Sustained.

Mr. Thompson: If there was any answer, may it be stricken?

The Court: Yes, it may be stricken.

Mr. Casterlin: I would like to make an offer of proof.

The Court: I will excuse the jury and they may wait in the corridor until the Bailiff calls for them.

(Admonition to the jury.)

In the Absence of the Jury:

Mr. Casterlin: The conditions of this bond and statute is that the bond is in the penal sum of \$10,000 for the use and benefit of the Shoshone-Bannock tribes of Indians conditioned for the payment of damages by reason of killing or maiming of any Indian belonging to said tribes. Lamar Pokibro was a member of the tribe and if he was damaged by the accident by reason of lessened support, I offer to show that. This statute runs to the benefit and use of the Shoshone-Bannock tribes of Indians.

The Court: The offer will be denied.

(Testimony of Frank Poewee.)

Mr. Casterlin: I offer to prove by this witness that prior to his injury he contributed by [145] labor and money to the support of his Foster parents. It being in the evidence that his natural parents have been long since deceased. And that since the injury, the amount that he has been able to contribute to their support and to his own support has been lessened.

The Court: The ruling of the Court will stand, offer refused. You may call the jury.

In the Presence of the Jury:

Q. Now, Frank, I think you said that you have leased your ranch to some Japanese?

A. Yes sir.

Q. Did you tell us the rental they pay?

Mr. Thompson: Yes, he said they paid \$9.00 an acre.

Q. That is \$9.00 for each one of the forty acres?

A. Yes.

Q. \$360.00 a year? A. Yes.

Q. Is that more or less than you made off the place when you operated it yourself?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. How old are you? [146] A. Thirty.

Q. You are thirty now? A. Yes.

Q. Do you know what became of the truck you were driving?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Frank Poewee.)

The Court: He may answer.

A. Yes, I do.

Q. What became of it?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial and not within the terms of the statute or bond.

The Court: He may answer.

A. Jesse M. Chase bought it.

Q. Who was the owner of that truck?

A. Lamar Pokibro.

Q. Did you use that in connection with your own ranch?      A. Yes.

Q. How?

A. Hauling grain, hay and wood and hauling for other people.

Q. You hauled for other people for money?

A. Yes sir.

Q. Other people would pay you for work with the truck?      A. Yes sir.

Q. To whom would you give that money? [147]

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial, and without any issue of this case.

The Court: Yes, it seems that is well taken, objection sustained.

Q. How do you feel now?

A. My back aches, my chest and my leg pains every once in a while.

Q. Do you have any brothers or sisters?

A. No sir.



(Testimony of Frank Poewee.)

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: He says that he has not.

Mr. Casterlin: That is all. You may examine.

### Cross Examination

By Mr. Thompson:

Q. How far do you live from the Fort Hall Agency?      A. About three miles and a half.

Q. Is it that far?      A. About that, I guess.

Q. How long have you lived there?

A. All my life.

Q. You have lived all your life at the place you now live?      A. Yes sir. [148]

Q. How long has that land, which you now occupy, been allotted to you or been in your possession?

A. Ever since my Mother and Father died.

Q. Ever since you were a small child?

A. Yes sir.

Q. Does anybody live with you?

A. Just my foster parents.

Q. They live on your place?      A. Yes sir.

Q. How many houses do you have on that place?

A. Two houses.

Q. You say there is forty acres of irrigated land?      A. Yes sir.

Q. This foster father that you speak of, how old is he?      A. Around about seventy, I believe.

Q. In the summer or this fall that you were hauling wood and were struck on the crossing, how much land did you cultivate and raise crops on?

(Testimony of Frank Poewee.)

A. On that forty acres.

Q. Did you have any horses or farm implements?

A. Yes sir.

Q. Tell us how many and what?

A. Three horses, and of course, my foster parents have some cattle.

Q. Did you have any plows or harrows? [149]

Mr. Casterlin: Do you mean in the entire family?

Mr. Thompson: On that place.

Mr. Casterlin: The question might not be intelligible, there are three places, one belonging to Lizzie Pokibro and one belonging to Lamar Pokibro and one to Frank Poewee, they are all separate places.

The Court: Do you understand that question?

A. Yes.

The Court: Go ahead.

Q. How many horses did you have, or how many do you have now? A. One horse to my name.

Q. How do you plow that land? How did you plow it this spring, what did you do for farm implements and horses?

A. I had to borrow the implements except a horse, and harrow.

Q. Whom did you borrow from?

A. Neighbors.

Q. The year before that, what did you do for a horse and plow? A. No sir.

Q. What did you do?

A. I had the land leased.

(Testimony of Frank Poewee.)

Q. You had your own.

The Court: He said he had the land leased.

Q. You had how much leased and to whom?

[150]

A. John Sider, forty acres.

Q. That was two or three years before the accident at the crossing?

A. That was three years before.

Q. Two years before the accident at the crossing who did you have it leased to?

A. I was working for myself.

Q. With one horse and a borrowed horse and borrowed farm implements? A. Yes.

Q. This year that you borrowed the horse whom did you borrow it from? A. My neighbors.

Q. What neighbors? A. Glen Tyler.

Q. You used that horse and your horse to plow and put in a crop? A. Yes sir.

Q. How much did you plow and how much crop did you put in? A. This year you talk about?

Q. Yes.

A. Sixteen acres barley and wheat.

Q. You didn't have any help until it came time to harvest and gather the crop, that is right?

A. Yes. [151]

Q. When you harvested the crop in previous years, before this collision, you got help at harvest time because one man cannot do it alone?

A. Yes sir.

Q. This year and last year you rented twenty acres to some Japs? A. Forty acres.

(Testimony of Frank Poewee.)

Q. In addition to that forty acres you raised sixteen acres of grain?

A. Yes, that was on Lamar's place, that is another twenty acres.

Q. But you didn't raise that?

A. I have mine leased.

Q. Now, if I understand you correctly you had gotten a load of poles for Ninip Toane and his wife on the date the accident occurred?

A. Yes.

Q. What kind of poles were they, and how much of a load did you have.

A. Quakenasp, a full load.

Q. A full load? A. Yes sir.

Q. How long were they?

A. From here to that door (indicating).

Q. From where you are to that door? [152]

A. No, not that, the next one.

Q. How many poles would you say there were?

A. I can't tell, quite a load.

Q. Let the jury know as near as you can how many there were. Were there a hundred?

A. About eighty I think.

Q. They were about how thick? At the butt or the stump end, how thick were they?

A. About that big around (indicating).

Q. About nine, ten or twelve inches through, let's say ten inches.

A. Yes, that is about right.

Q. The car had a cab, or a seat with a top over it?

A. Yes sir.

Q. The poles were back of you? A. Yes.

Q. As you approached the crossing you came

(Testimony of Frank Poewee.)

down the road alongside the railroad track toward Pocatello?           A. Yes.

Q. You came down the Fort Hall side?

A. Yes.

Q. Then you had to make a right hand turn when you got to the crossing to come to this side?

A. Yes sir.

Q. How many feet away from the *tackes* was it that you made [153] that right hand turn?

A. I can't say how many.

Q. Was it as much as the width of this Court room. From this door to the back of the jury?

A. About that I guess.

Q. Would you say it was twice as wide as that?

A. No.

Q. We will pass that. How fast were you coming before you started to make the turn?

Mr. Casterlin: Objected to as incompetent, irrelevant and immaterial. (Argument of counsel reported and not transcribed.)

Mr. Thompson: I will withdraw this question but I will urge my right to examine him relative to this crossing.

Mr. Casterlin: The only material point here is: Was he struck by that train, if the answer is no, then we have no case, but if the answer is yes, that is as far as the matter goes.

The Court: Let's proceed, there is nothing before the Court, the question was withdrawn.

Q. Now, Frank, I understood you to say something about the speed of the automobile as you

(Testimony of Frank Poewee.)

started to go on the track, you did testify to that didn't you, as you went to go over the crossing?

Mr. Casterlin: He said that he slowed down [154] and shifted gears.

Q. Yes.

The Court: He may answer.

Q. Where did you slow down to shift gears?

A. Near the crossing.

Q. Then it was before you made the turn that you slowed down and shifted gears?

A. Yes sir.

Q. What speed did you slow down to when you shifted gears? A. Five.

Q. Five miles an hour. A. Yes.

Q. As you proceeded from there up to the track where you stopped, what speed did you travel at?

Mr. Casterlin: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Just that five miles an hour.

Q. You said that Helen Toane made some statement of exclamation, is that right? A. Yes.

Q. Where was the automobile then, and what did she say?

A. We were on top of that one track and she looked to the right and said here comes a train.

Q. You were on the track then, already?

A. Yes. [155]

Q. When you left the hospital at Fort Hall, it was the 20 of November? A. That's right.

Q. You went home and didn't do anything until Spring? A. That's right.



(Testimony of Frank Poewee.)

Q. You didn't have anything you could do until spring? A. Yes.

Q. What did you have that you could do?

A. I could have done chopping wood and hauling water.

Q. Cutting wood and hauling water.

A. Yes. Lamar did most of the work at that time.

Q. Who is Lamar? Is he the man who had an interest in the automobile? A. Yes.

Q. I think you said that you do not have an automobile now, or do you?

A. I don't own any automobile now, just my foster parents.

Q. I think you said to your lawyer that you hauled wood last Winter, some, did you?

A. Yes.

Q. Where did you haul wood and how and where?

A. When was this that you talk about now?

Q. Last winter or last fall, a year ago.

A. From up in the hills.

Q. How far did you go, where was it and how far? [156] A. About eighteen miles.

Q. Where? A. Toward the east.

Q. What kind of a thing did you have to haul wood in. What kind of a vehicle, an automobile?

A. This trailer.

Q. Truck? A. Trailer.

Q. What kind of loads would you haul, about the sort that you testified to here? A. Yes.

(Testimony of Frank Poewee.)

Q. The same kind of wood? A. Yes.

Q. About the same size and length?

A. Yes.

Q. Did you come to Pocatello often before this collision? A. Yes. You mean on this truck?

Q. Yes. A. Yes.

Q. What road did you take?

A. The dirt road and sometimes on the highway.

Q. The same road that you were coming on at this time? A. Yes sir.

Q. So that you have been over that crossing a lot of times before that day?

A. Yes sir. [157]

Mr. Thompson: That is all.

### Redirect Examination

By Mr. Casterlin.

Q. When did you lease your ranch to the Japanese? A. Just last spring.

Q. That is how many acres? A. Forty.

Q. Forty acres? A. Yes.

Q. Tell us again, how many acres of plow land does Lizzie Pokibro have? A. Thirty.

Q. And how many acres of plow land does Lamar have? A. Sixteen.

Q. And this plowing that you did in 1943, was that on your forty acres or on Lizzie's or Lamar's land? A. Lamar's.

Q. On his? A. Yes.

Q. The year before that what did you do with your forty acres of land?

(Testimony of Frank Poewee.)

A. Farmed the land.

Q. Who farmed Lizzie's land?

A. Some Greeks.

Q. Who farmed Lamar's land?

A. The same Japanese that have my place. [158]

Q. So that you didn't farm any of the land that belonged to Lizzie or Lamar in 1942?

A. No sir.

Q. During 1941 what did you do with your forty acres? A. I farmed my land.

Q. What did Lizzie do with her land?

A. She got her leased.

Q. What did Lamar do with his land?

A. Got his leased.

Q. That was in 1941, the year of the wreck?

A. Yes.

Q. When you testified about sixteen acres you plowed, that was on Lamar's place? A. Yes.

Q. It wasn't on your own place at all?

A. What year was this?

Q. In 1942.

A. I plowed my own land in 1942.

Q. The sixteen acres in 1943 was on whose land?

A. Lamar's.

Mr. Casterlin: That is all.

Mr. Thompson: That is all, nothing further.

Mr. Thompson: Now, Mr. Casterlin, will you stipulate that the distance from the witness chair to the entrance,—the door that the witness indicated, that it is thirty feet. [159]

Mr. Casterlin: I do not know the distance in

feet, I will leave it up to the jury to determine. They are right here.

Mr. Thompson: But you don't want to put it in the record as thirty feet.

Mr. Casterlin: But the jury knows how far it is.

Mr. Thompson: All right, if you don't want to stipulate.

Mr. Casterlin: I don't know the number of feet.

Mr. Thompson: How far would you approximate it to be?

Mr. Casterlin: I don't want to testify.

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### LAMAR POKIBRO

Being called as a witness on the part of the Plaintiff, after first being duly sworn, testifies as follows:

#### Direct Examination

By Mr. Casterlin.

Q. Your name is Lamar Pokibro. A. Yes.

Mr. Casterlin: I offer to show by this witness that he is the foster parent of Frank Poewee and that he with his wife raised Frank Poewee after the death of his natural parents; that he is the owner of the truck [160] mentioned; that he paid \$125.00 for the truck and that he put on approximately \$65.00 or \$75.00 worth of tires, and bought a battery for \$15.00 and put it in the car; that he put a box on the truck, I don't have the cost of that right here; that the total outlay on that truck within two months was \$250.00 or \$255.00 and that im-

(Testimony of Lamar Pokibro.)

mediately after the accident he sold the truck for \$35.00; that he is damaged in the amount of the difference between \$250.00 and \$35.00.

The Court: Offer rejected. He is not a plaintiff in this case, nor is the Government asking for damages on his behalf.

Mr. Casterlin: May we agree that the following offer may be made and the Court's ruling had for all intents and purposes in this action as if the witnesses named were sworn and put on the witness stand?

Mr. Thompson: That may be agreed unless there is something that I have an objection to.

Mr. Casterlin: The next witness would be Clinton Bear. He is a half-brother of Helen Toane, deceased. I propose to prove by him that he and his own blood sisters and Helen Toane were raised together as children; lived together as children, and that throughout the years they have visited back and forth, celebrated festival days together; had holiday dinners [161] together and family dinners together; that the death of Helen Toane has resulted in the loss of companionship and breaking up of the family. That her half sister and brothers who do not live in the same household have missed the associations.

Mr. Thompson: That will be objected to as incompetent, irrelevant and immaterial.

The Court: The purpose of the offer is that you are asking for damages for them on account of the loss of companionship which they had during

her lifetime, after her marriage to Ninip Toane. I think the offer will be rejected and the same ruling had. I don't think it is the measure of damages.

Mr. Casterlin: May the same stipulation and the same offer and the ruling be had as to Lillie Nagitsy; Mrs. John Tendoy; Pansy Edmo who is a full sister to Ninip Toane?

Mr. Thompson: Where do they live?

Mr. Casterlin: Pansy lives in Wyoming.

Mr. Thompson: And the others?

Mr. Casterlin: The others live in Fort Hall.

Mr. Thompson: The same objection and on the same grounds.

The Court: The same ruling.

Mr. Casterlin: I will probably have a couple more witnesses, I wonder if we may have a short recess. [162] It may shorten the trial.

The Court: We will take a recess until 10 o'clock in the morning. Admonition to the jury

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10 o'clock A. M. October 19, 1943.

### BILL EDMO

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Casterlin:

Q. Your name is Bill Edmo?

A. Yes, Bill Edmo.

Q. Where do you live?                      A. Fort Hall.



(Testimony of Bill Edmo.)

Q. Are you a member of the Shoshone-Bannock Tribe of Indians?      A. Yes sir.

Q. Were you acquainted with Ninip Toane and Helen Toane during their lifetime?      A. Yes.

Q. Were you present at any time during their funeral?      A. All of the time.

Q. How long did that funeral service last?

A. Four days.

Q. Do you know of your own knowledge how many beeves were used at the funeral?

A. Yes. [163]

Q. How many?      A. Two.

Q. Were you present when the same was killed?

A. Yes.

Q. Do you know the value of these animals at the time they were killed?      A. Yes.

Q. What was the value?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Unless the Government intends to connect that up with the actual payment for the beeves out of the estate or property of the deceased I think it would be incompetent. I will hear from you on that.

Q. Who owned these beeves?

A. Ninip owned one and one is mine.

Q. What was the value of the beef that was owned by Ninip Toane?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial because the funeral ex-

(Testimony of Bill Edmo.)

penses paid out of the estate are not chargeable in a suit of this kind.

The Court: I will allow it at this time, however, I will take it under advisement subject to being stricken later [164]

A. I know that both of the beef was worth \$90.00 at that time.

The Court: That answer may be stricken I don't think it is responsive.

Q. What was the value of the one belonging to Ninip Toane?

A. I think it would be just the same price.

Q. That would be \$90.00?

Mr. Thompson: He said both would be worth \$90.00.

A. Each one.

Q. Who owned the other one?

A. It was mine and one Ninip's.

Q. You owned the other? A. Yes.

Q. Was the beef which you owned used at the funeral? A. Yes.

Mr. Thompson: Do I have my objection?

The Court: Yes, you have your objection and the Court has ruled that the other beef would not be admissible unless it was connected up with the estate, as having been paid for with the property of the deceased.

Q. Did anyone pay you for your beef?

A. No.

Q. What was that worth? A. \$90.00.

Mr. Thompson: May that answer be stricken for an objection. [165]

(Testimony of Bill Edmo.)

The Court: Yes, it may be stricken.

Mr. Thompson: Now, may I have my objection to that question.

The Court: The objection is sustained.

Mr. Casterlin: At this time we offer in evidence plaintiff's exhibits numbered 3, 4, 5, 6, 7 and 8 being photographs taken at the scene of the accident on October 30, 1941, by J. H. Deal, the agricultural agent at the Fort Hall Agency.

Mr. Thompson: We have seen them and we consent.

The Court: They may be admitted.

Mr. Casterlin: That is all, you may examine.

Mr. Thompson: No cross examination.

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## JACOB BROWNING

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Casterlin:

Q. Your name is Jacob Browning?

A. Yes sir.

Q. Where do you live?           A. Fort Hall.

Q. Are you a member of the Shoshone-Bannock tribe of Indians? [166]           A. Yes sir.

Q. Were you acquainted with Ninip Toane and Helen Toane during their lifetime?

A. Yes sir.

(Testimony of Jacob Browning.)

Q. Do you know anything about their funeral?

A. Yes.

Q. Were you present at the funeral services?

A. Yes.

Q. Did you see the bodies of Ninip Toane and Helen Toane?

A. Yes sir.

Q. How long did the funeral last?

A. Well, under the Indian custom if any of the Indians die it lasts from three to four days that they view the body.

Q. Did you view the body of Ninip Toane?

A. Yes sir.

Q. And did you view the body of Helen Toane?

A. Yes.

Q. Did you observe how they were clothed or dressed?

A. Yes.

Q. Just explain how they were dressed?

A. They were dressed up in Indian regalia.

Q. What was the regalia they had on.

A. They had pants made by the Indians, beaded vest, neck-tie moccasins and other articles.

Q. Do you know the value of the Moccasins?

[167]

A. Yes sir.

Q. What was that?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained for the same reason that the other objection was sustained, unless counsel advises the court that he intends to connect it up,

(Testimony of Jacob Browning.)

—to show that these articles were furnished by the estate and charged to the estate.

Q. Do you know who furnished any of these articles, the moccasins, shirt and pants?

A. I don't know exactly but I think they were furnished by relations.

Q. Tell us again what you saw them dressed in?

A. Necktie, beaded vest, moccasins, beaded pants, belts, Indian beaded belts.

Q. Was that all according to the Indian custom?

A. Yes sir.

Mr. Casterlin: I think I should say at this time that I cannot assure the Court that these were paid out of the estate of the deceased. This is for the purpose of the record.

Q. Mr. Edmo, do you know the value of these different articles that you have mentioned?

A. Yes sir.

Q. What was the value of the beaded buck-skin vest which you saw. [168]

Mr. Thompson: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Casterlin: I think that is all,—I called you Mr. Edmo, I beg your pardon, I meant to say Mr. Browning.

Mr. Thompson: May it be understood that the same objection will run to all these items, to the cost of all the articles.

The Court: Yes, and the ruling is the same and you, Mr. Casterlin, may have an exception.

Mr. Thompson: No cross examination.

TOM TYBOATS

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Is your name Tom Tyboats?

A. Yes sir.

Q. Where do you live.

A. A little west,—this side of Fort Hall.

Q. Do you live on the Fort Hall reservation?

A. Yes.

Q. Are you a member of the Shoshone-Bannock tribe?

A. Yes.

Q. Did you see,—were you acquainted with Ninip Toane and [169] Helen Toane.

A. Yes, well acquainted with them.

Q. Did you see them on October 29, 1941, the date the accident occurred on the railroad at the Fort Hall school crossing?

A. He seen the accident there, he was at the accident.

Q. Did you see Ninip Toane and Helen Toane then?

A. Yes, he seen them, all he seen was by the railroad track.

Q. At that time was Helen Toane dead or not?

A. At that time he was right by the railroad track, right by the body and he knows this, that Helen Toane took two breaths and that was the end of her.

Q. Was Ninip Toane alive at that time?



(Testimony of Tom Tyboats.)

A. Well, Ninip Toane was breathing at that time.

Q. Did you see Frank Poewee at that time?

A. He seen him too.

Q. What if anything was Ninip Toane doing when you saw him?

A. Mr. Thompson: I object to it as being incompetent, irrelevant and absolutely immaterial.

The Court: He may answer.

Q. At the time when he saw Ninip he was laying there and he didn't move, he was just barely breathing.

Q. Was there any other evidence that Ninip was alive except his breathing?

A. By the evidence that he seen, he was just barely breathing.

Mr. Thompson: There isn't any materiality [170] to this.

The Court: There isn't any question but what the Indian is dead, is there?

Mr. Casterlin: No.

Mr. Thompson: No question at all.

The Court: It seems to have little materiality.

Mr. Casterlin: I have another reason for these questions.

The Court: You may go ahead.

Q. Were there any other Indians present at the time you saw the bodies there?

A. There wasn't any other Indian at the time he was there first, but a little afterward there was another Indian arrived there in a coupe.

(Testimony of Tom Tyboats.)

Q. Was your wife there with you at that time?

A. Yes.

Q. What if anything was Frank Poewee doing?

A. He says at that time Frank he raised up. Raised himself up with one arm, kind of sat up sideways and Tom asked Frank how he was feeling.

Mr. Thompson: Object to any conversation as not being responsive.

The Court: Objection sustained.

Q. Did Frank say anything to you at that time?

Mr. Casterlin: To Interpreter, now his answer must be yes or no to this question [171]

A. He said he was feeling all right.

Q. In what condition were the bodies of Helen Toane and Ninip Toane?

Mr. Thompson: I don't want to make needless objections, but I object to this as being incompetent, irrelevant and immaterial. May I have a standing objection to this line of questioning?

The Court: The objection is sustained to this question. It has been brought out before.

Mr. Casterlin: That is all.

Mr. Thompson: That is all.

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## TOANE

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Casterlin:

Q. What is your name?

(Testimony of Toane.)

A. He is known by Toane.

Q. Where do you live?

Mr. Thompson: We admit that he is a Shoshone Indian on the Fort Hall Reservation.

A. He said he is living with his daughter.

Mr. Casterlin: You admit that he is a Shoshone-Bannock Indian? [172]

Mr. Thompson: Yes.

Q. Are you related to Ninip Toane?

A. Ninip Toane is my son.

Q. Did Ninip Toane contribute to your support during his lifetime?

A. He contributed very little.

Q. Did you live with Ninip Toane at any time?

A. He lived with him part of the time some time ago.

Q. When was the last time you lived with him?

A. He doesn't remember exactly the years, it is quite a while back.

Q. When did you last see Ninip Toane, when did you see Ninip Toane the last time?

A. The last time was just before his eyes went out, that is the last time he saw Ninip himself.

Q. Do you live on the Fort Hall Reservation or over in Wyoming?

A. He is living at Fort Washakie at the present time.

Mr. Casterlin: May we agree it is in Wyoming?

Mr. Thompson: Yes.

Q. How long have you lived there?

A. He thinks about four years.

(Testimony of Toane.)

Q. During that time did Ninip Toane come to see you or to visit with you?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial. [173]

The Court: Objection sustained.

Mr. Casterlin: That is all.

Mr. Thompson: We have no cross-examination.

Mr. Casterlin: We rest.

Mr. Thompson: May it please the Court and Ladies and Gentlemen of the jury, I think without any further ceremony I will proceed to the introduction of our evidence.

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LEWIS B. GRIFFIN,

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. What is your name?

A. Lewis B. Griffin.

Q. What is your occupation and where do you live?

A. 121 Rosewood, Alameda and my occupation is a brakeman.

Q. Alameda is in the suburbs of Pocatello?

A. Yes sir.

Q. Where and how were you employed on October 29, 1941?

A. Head brakeman for a freight train.

(Testimony of Lewis B. Griffin.)

Q. That was on the Union Pacific?

A. Yes sir.

Q. Who was your Engineer?

A. Mr. Moore Dick. [174]

Q. How big a train was it?

A. It was a big train, 65 or 66 cars.

Q. Do you remember an incident of a collision of the locomotive of this train and an automobile at Fort Hall, about a mile south of the Fort Hall Crossing on the evening of that day?

A. Yes sir.

Q. Just tell the jury what you saw there as your train entered upon that crossing.

A. We approached that from the north. I saw this car coming off the highway, we were quite a ways from the crossing.

Q. How far would you say?

A. Two hundred yards at least. The engineer was blowing the whistle.

Mr. Casterlin: We object to this answer as being incompetent, irrelevant and immaterial for the reason that under the law and the bond given, the railroad company is an insurer even against unavoidable accidents and the question of negligence and proximate cause when based upon the question of negligence is irrelevant and immaterial.

The Court: I will permit the witness to answer at this time with the understanding that the Court will take this line of questioning under advisement and will later order it stricken if I determine it is incorrect. [175]

(Testimony of Lewis B. Griffin.)

Mr. Casterlin: May it be understood that the objection runs to all questions and answers respecting matters connected with the defense of, and on the ground of proximate cause?

The Court: It *may so* understood and the Court will permit the answers with the understanding that the Court is taking the matter under advisement and will rule on the admissibility of the testimony before the close of the case.

Q. Describe the blowing of the whistle and what kind of a whistle it was and where he began to sound it?

A. He began to sound it at the whistling board.

Q. How far is that from the crossing?

A. About thirteen hundred feet.

Q. Can you give the jury some idea of how much whistling he did between the whistling board and reaching the crossing?

A. He was whistling continuously,—he just blasted the whistle I should say four at least,—four long blasts of the whistle and the bell was ringing.

Q. You started to tell us that you saw an automobile turn off the road or something, where did it turn and what did it do?

A. It was coming south on the highway parallel with the railroad, and he turned into this road up to the railroad and at the time I couldn't tell whether he was going to stop or go on across. He had time to [176] go across I think but he drove up and stopped with the cab right on the railroad track.



(Testimony of Lewis B. Griffin.)

Q. Do you know what the engineer did as he drove upon the track?

A. He went to the emergency with his brakes.

Q. What does the emergency mean?

A. He gave it all the braking power you possibly have.

Q. Was there anything between you or your engine and the automobile or the driver of the automobile at the time the automobile driver made the turn to the west toward the railroad track and from then on until he drove upon the track?

A. No sir, nothing in the way. I could see him very plainly, that is, I could see the car.

Q. Was there anything anywhere in there between the highway that parallels the track on the east and the railroad track for a half mile north from the crossing?

A. No sir, I don't think there is anything there.

Q. How fast was the train moving, about, when this man made the turn and drove upon the track?

A. I should judge between 37 and 42 miles an hour, along in there someplace.

Q. Were there any lights on the locomotive?

A. Yes sir, the headlight was burning.

Q. What kind of a headlight?

A. An electric headlight. [177]

Q. Bright or dim? A. Bright.

Mr. Thompson: That is all.

(Testimony of Lewis B. Griffin.)

Cross Examination

By Mr. Casterlin:

Q. You testified that he stopped the cab of the automobile right on the track, who did you mean by he?      A. Whoever the driver was.

Q. How do you know that he stopped the car?

A. Well, the car stopped.

Q. Do you know why the car stopped?

A. I spoke to him and he told me that it stalled.

Q. Then you intended to say that the automobile stalled, and not that he deliberately stopped it?

A. I cannot say that.

Q. He told you that the car stalled on the track.

A. I understood him to say that.

Q. Well, that is what he told you?

A. Yes, that is what he told me.

Q. And that is what it looked like to you?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion.

Mr. Casterlin: Withdraw the question.

Q. Where is this headlight on the engine?

A. On the front end. [178]

Q. Where were you?

A. On the brakeman's seat in front of the fireman, I could see it all.

Q. You were sitting in the brakeman's seat in the cab?      A. Yes sir.

Q. Looking into the headlight?

A. I could see the reflection of the headlight.

Q. You could say it was on bright?

(Testimony of Lewis B. Griffin.)

A. I could see the automobile all right.

Q. What time was it?

A. It was between dusk and dark.

Q. You could see the automobile without light?

A. Not as plain.

Q. How could you say the headlight was burning bright?

A. They always burn that way.

Q. How could you say that it was bright?

A. It was as good as any I ever rode behind.

Mr. Casterlin: That's all.

#### Redirect Examination

By Mr. Thompson:

Q. Which side of the cab were you on?

A. The left hand side.

Q. Which side was the engineer on?

A. The right hand side.

Mr. Thompson: That is all.

Mr. Casterlin: Yes, that's all. [179]

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#### MORRIS LOWELL DICK

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Thompson:

Q. What is your full name?

A. Morris Lowell Dick.

Q. Where do you live?

A. 224 West Sublet.

(Testimony of Morris Lowell Dick.)

Q. Pocatello, Idaho? A. Yes sir.

Q. You are a little hard of hearing?

A. No, but I have a cold and it does affect me at the present time.

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been an engineer?

A. Since August 1912.

Q. By whom have you been employed during that time?

A. The Union Pacific and the Oregon Short Line.

Q. Generally on what division?

A. On the Montana division at that time.

Q. Where does that run?

A. Between Pocatello and Butte.

Q. On the afternoon of October 29, 1941 in the late afternoon, [180] between five and six o'clock that day, where were you and what were you doing?

A. I was on 278 coming east.

Q. What was 278?

A. That is a regular freight train coming east.

Q. When you say coming east, is that according to compass directions or railroad directions?

A. Railroad direction.

Q. And according to compass direction how was it? A. It would be south.

Q. Do you recall an accident or collision between your engine and an automobile, or between an automobile and your engine at the crossing about a mile south of Fort Hall, that day? A. Yes sir.

(Testimony of Morris Lowell Dick.)

Q. Did you state that you were the engineer in charge of that locomotive and operating it?

A. Yes sir.

Q. Tell us what you saw and what you did as you approached that crossing.

Mr. Casterlin: At this time we make the same objection to the testimony of this witness as to the last one. We understand that it runs to all testimony which goes to the fourth defense in this action, and we make it on the grounds heretofore stated.

[181]

The Court: The same ruling.

A. Approaching that crossing I had passed the whistling post and, of course, had the bell ringing. I was whistling for the crossing and about the time that I was whistling the second time I saw the light of the automobile come up on the crossing and stop. The headlight seemed to be in about a line with the right rail. I thought for a second or two that he was going over and when I saw that he didn't move I placed the brake in emergency, opened the sander and finished whistling in short blasts.

Q. You said that the headlight was in line with the right rail, what headlight did you mean?

A. The automobile headlight.

Q. What do you have to say about your own headlight?

A. It was on bright and in good shape.

Q. When you apply the brake in emergency, what do you mean?

(Testimony of Morris Lowell Dick.)

A. I mean that you obtain all the braking power that is possible on that train.

Q. Was there anything that you might have done that you didn't do to avoid the collision?

A. No sir.

Q. After you saw the automobile?

A. No sir, there wasn't.

Q. At what speed were you traveling as you observed the automobile or its headlights? [182]

A. About forty miles an hour.

Q. Who was your fireman?

A. A fellow by the name of Pixton.

Q. Have you seen him of recent times, or for several months past?      A. No sir, I haven't.

Mr. Thompson: Will you take my statement for the record that the fireman Pixton,—that our last advice is that he was in the State of Washington.

Mr. Casterlin: Yes, I will accept that statement.

Mr. Thompson: You may examine, that is all.

#### Cross Examination

By Mr. Casterlin:

Q. Were you with Mr. Griffin when he talked to the driver of this car?      A. Yes sir.

Q. What did the driver tell you, if anything, happened when he drove on to the track?

A. He said the car stalled.

Q. The car having stalled on the railroad track and your engine and train coming as you have de-



(Testimony of Morris Lowell Dick.)

scribed, isn't it a fact that the accident was unavoidable?

Mr. Thompson: Objected to as seeking to establish a legal question.

The Court: I think that is a question [183] for the jury.

Q. How long have you been railroading?

A. For thirty-six years.

Q. Have you ever had any accident before?

A. Yes sir.

Q. You understand what we mean by accident?

A. Yes, I think I do.

Q. Do you have an opinion as to whether this accident on October 29, 1941 was an unavoidable accident or not? You can answer that question yes or not.

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial, it calls for an opinion and not a fact.

The Court: He may answer that yes or no.

Q. Yes, just answer that yes or no.

A. If I understand it is this way, could this have been avoided?

Q. Do you have an opinion as to whether the accident was unavoidable or not?

Mr. Thompson: I submit that counsel should answer the witness' question.

The Court: If you don't understand the question you may say so.

A. Does he mean that this accident could have

(Testimony of Morris Lowell Dick.)

been avoided or could not have been under the circumstances? [184]

Q. Do you have an opinion as to that?

A. Not on my part it couldn't.

Q. With their engine stalled on the track could it have been avoided from their standpoint?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion or opinion of the witness.

Mr. Casterlin: Withdraw the question.

The Court: He can testify as to what he observed, but you have withdrawn the question.

Q. Based upon your experience as an engineer and a train man, do you have an opinion as to whether this accident could have been avoided at all under the circumstances of the automobile being stalled on the track?

Mr. Thompson: We object to this, it is all covered by the previous question, the objection and the ruling of the Court. It is repetition.

The Court: I think the witness has answered. However, I will permit him to answer again.

Q. Do you have an opinion?

A. He could probably have gotten that car off, but I don't know.

Q. You say he could have gotten the car off. How long was it between the time that the car stalled and the time when the accident occurred?

A. About twelve to fourteen car lengths. [185]

Q. How long would it take 12 or 14 cars to pass that distance? A. I didn't figure that out.

(Testimony of Morris Lowell Dick.)

Mr. Thompson: I have a table here to figure it if you would like it.

Q. I call your attention to exhibit 8 and I will ask you to state whether or not in your opinion the occupants of that car could have gotten out, with a stalled engine and moved that car off the track by hand and avoided the accident?

Mr. Thompson: I object to that as not proper cross examination.

The Court: Yes, I think we are going too far afield. The objection is sustained.

Mr. Casterlin: That is all.

Mr. Thompson: Yes, that is all.

Mr. Casterlin: I will accept that statement of computation at this time.

Mr. Thompson: According to the table which I have and upon which I rely.

Mr. Casterlin: We will both rely on it.

Mr. Thompson: At forty miles an hour an object traveling at 40 miles an hour covers 58.67 feet of space per second.

Mr. Casterlin: That is at 40 miles an hour?

Mr. Thompson: Yes. [186]

MRS. UNA JONES

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. What is your name, please?

A. Una Jones.

Q. You are perhaps thirty-five or forty years old?

A. Yes sir.

Q. Where do you live?

A. One mile south of Fort Hall, Idaho.

Q. Do you remember the occasion of the collision between a locomotive, or engine and an automobile on the evening of October 29, 1941, at a crossing about a mile south of Fort Hall?

A. Yes sir.

Q. Where is that crossing with reference to your home?

A. My home is a quarter of a mile Northwest.

Q. On the west side of the track?

A. Yes sir.

Q. Would you say that it is approximately due northwest from the crossing?

A. Yes sir.

Q. Is that a quarter of a mile by road?

A. By road. [187]

Q. The shortest distance is what, between these points?

A. One half of that distance, I figure almost half.

Q. Did you observe the train as it approached the crossing?

A. Yes sir.

(Testimony of Mrs. Una Jones.)

Q. Did you hear any signals as it approached the crossing?

Mr. Casterlin: The same objection to this as I made to the other questions as to the fourth defense.

The Court: The same ruling.

A. Yes sir.

Q. Tell the jury what signals, if any, you heard from the engine.

A. Well I heard signals that were different that the signals that I always heard, that is what drew my attention.

Q. Would you say how far the engine was from the crossing when you first was conscious of its whistling?

A. I would say the length of two telephone poles.

Q. Two pole lengths.

Q. When I turned away quit looking I guess it was about one car length from the crossing.

Q. Did you observe the actual impact?

A. No sir.

Q. Tell us what you observed about the automobile.

A. I saw the headlights of the automobile when I heard the whistle, and it was different than the whistle for cattle on the crossing. I think he was trying to warn that automobile from pulling up in front. [188]

Q. Where was the automobile when you first saw it?

(Testimony of Mrs. Una Jones.)

A. Kind of coming toward me on the other side of the track.

Q. Did you observe what the automobile was doing when you saw it?

A. It was traveling when I first saw it.

Q. Your name is what? A. Una Jones.

Q. Are you married? A. Yes sir.

Q. Does your husband work for the railroad company? A. No sir.

Mr. Thompson: That is all.

Mr. Casterlin: No questions.

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### WYNN McCURDY

Being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Thompson:

Q. What is your name?

A. Wynn McCurdy.

Q. How old are you? A. Sixty-two.

Q. Where do you live? A. Blackfoot.

[189]

Q. Have you made any measurements of any distance within this Court room, and if so when?

A. Yes, I have. This morning.

Q. With what did you make that measurement?

A. With a tape line.

Q. Have you that tape line with you



(Testimony of Wynn McCurdy.)

Mr. Casterlin: We don't object to that.

Q. What measurement did you make?

A. From the edge of this chair to the center of that door (indicating).

Q. What was the measurement?

A. Thirty-six feet and six inches.

Q. What chair do you mean?

A. This witness chair.

Q. And the center of the door is the rear of the two doors, the ones back of the rail in the court room?

A. That would be the door, and the other measurement was across the center of the building, that was 27 feet.

Q. You measured from a point back of the jurors? A. Right by that rail (indicating).

Q. That is the same distance as the back of the jurors to the other wall? A. Yes sir.

Q. That was 27 feet? A. Yes sir. [190]

Q. What was your employment on October 29, 1941? A. Section foreman.

Q. Where? A. Fort Hall.

Q. How long had you been employed as Section Foreman? A. At Fort Hall?

Q. At any place.

A. At that time about twenty-six or twenty-seven years.

Q. You had been section foreman for 26 or 27 years? A. At that time, yes sir.

Q. Was the track at that point under your supervision? A. Yes sir.

(Testimony of Wynn McCurdy.)

Q. When had you last been over it, before this collision?      A. That day,—that morning.

Q. Did you observe its condition?

A. Yes sir.

Q. What was its condition, at the crossing?

A. It was good.

Q. Describe to the jury how it was constructed.

A. Between the rails it is fully planked and on the outside one 12 inch plank on the outside of each rail, and the approach, I can't say for exactly the number of feet, is level, with a little bit of an incline on both sides.

Mr. Thompson: That is all.

Mr. Casterlin: No questions.

Mr. Thompson: That is all, the defense rests.

[191]

The Court: At this time I think we will recess until 1:30. Admonition to the jury.

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1:30 P.M. October 19, 1943.

The Court: The matters that the Court took under advisement regarding the fourth defense will be allowed to stand, and the motion to strike denied, and the questions and answers objected to will be allowed to stand and the objection overruled.

## FRANK POEWEE

Being called in rebuttal on the part of the plaintiff, having been duly sworn testifies as follows:

## Direct Examination

By Mr. Casterlin:

Q. Your name is Frank Poewee? A. Yes.

Q. You are the same person who testified before in this action? A. Yes.

Q. Did anything happen to your automobile when you had driven it on the railroad track at the school crossing on the Fort Hall Reservation on October 29, 1941? A. Yes.

Q. What was that?

A. The car stalled and I couldn't get it to go.

Mr. Casterlin: That is all. [192]

## Cross Examination

By Mr. Thompson:

Q. I believe you said yesterday that Helen Toane said "here comes a train" or "here is a train."

Mr. Casterlin: Objected to as not proper cross examination at this time, and not pertaining to any question asked in rebuttal. The only question asked here was whether the car was stalled.

The Court: He may answer.

A. Yes.

Q. Where was your automobile at that time?

Mr. Casterlin: Objected to on the same ground.

The Court: He may answer.

A. Just on that one track.

Q. On the first rail, the first track?

(Testimony of Frank Poewee.)

A. Yes.

Q. And then your automobile stalled?

A. Yes.

Q. Now, what kind of an automobile was this?

A. 1935 Chevrolet, a Chevrolet truck, no, it was 1934.

Q. 1935 Chevrolet truck? A. No, 1934.

Q. And it had been bought as a second hand, used car by someone up there? A. Yes. [193]

Mr. Thompson: That's all.

Mr. Casterlin: That's all, and the plaintiff rests.

Mr. Casterlin: At this time the Government having rested and the defense having rested, I move to have stricken the fourth defense to all of the causes of action on the ground that the same is not a defense to this action and all the evidence in respect thereto is incompetent, under the law and the facts of this case.

The Court: The motion will be denied.

Mr. Thompson: The defendants move for a directed verdict in favor of the defendants upon the ground that the collision and consequences thereof were not proximately caused by anything that the Railroad Company or its employees in the operation of the train did, or could have anticipated or avoided. But that the sole proximate cause was the act of the driver of the auto attempting to cross the track with a large load of long poles in the immediate presence of a rapidly approaching train, which train he could and should have seen if he looked therefor, as he was bound to do, and could

and should have heard the whistles and bell thereof if he had listened therefor, as he was bound to do, and seeing and hearing give precedence of passage to, and but for which the collision would not have occurred. [194]

That the collision was not the result of inevitable accident, because it was the duty of the driver to stop his auto and give precedence to the train, the headlights of which was in plain view and the signals of which were being sounded: On the contrary it was inevitable risk.

The Court: The motion is denied.

Mr. Thompson: And we will take an exception.

#### Instructions To The Jury

The Court: Ladies and Gentlemen of the jury: I shall avoid doing anything more than to attempt to bring to your attention a brief statement of the pleadings and a bare outline of the real issues and principles of law which are applicable here.

The issues before you are *quiet* simple and as counsel have during the trial, and in their argument, gone into the matter rather fully, it will not be necessary for me to go into detail as to the claims of the respective parties.

The issues are made up of the plaintiff's complaint, and the answer of the defendant Union Pacific Railroad Company.

The action is brought in the name of the United States of America for and on behalf of the Shoshone and Bannock tribes of Indians, for damages [195] alleged to have accrued by reason of the kill-

ing and maiming of certain Indian persons; the complaint alleges proper jurisdiction of this Court and calls attention to a certain Act of Congress; they allege in the complaint, the corporate capacity of the Oregon Short Line Railroad Company, and that it is the successor of the Utah Northern Railway Company; they also allege the corporate capacity of the Saint Paul Mercury Indemnity Company, also their right to do business in the State and District of Idaho. Plaintiffs allege that on July 3, 1868 at Fort Bridger in the Territory of Utah, a certain treaty was entered into between the United States of America and the Shoshone and Bannock tribes of Indians,—this has also been explained to you by counsel for the respective parties. It is alleged in the complaint that the Fort Hall Indian reservation was referred to in the treaty which I have mentioned. It is further alleged that as a consequence of the treaty mentioned and certain Acts of Congress, the predecessor of the Oregon Short Line Railroad Company was permitted to construct and operate a railroad across the Fort Hall reservation providing that the railroad Company, its successors and assigns, execute a bond in the penal sum of \$10,000 for the use and benefit of the Shoshone and Bannock tribes of Indians, the conditions of the bond being [196] by statute provided as follows: “That said railway Company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of \$10,000 for the use and benefit of *of* the Shoshone and Bannock Tribes



of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes or either of them or of their livestock, in the construction or operation of said railway or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any Court of the territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States:" It is alleged that the memorandum agreement is contained in the Act of Congress of September 1, 1888.

It is further alleged that the Oregon Short Line Railroad Company is the successor of the Utah Northern Railway Company and that at all times mentioned in the Complaint as being material to this cause of action, maintained and operated a railroad across the Fort Hall Indian reservation.

It is also alleged that for the privilege of [197] maintaining and operating the railroad that the Oregon Short Line Railroad Company executed and delivered to the United States for the use and benefit of the Shoshone and Bannock tribes of Indians and parties in interest, a certain bond as required, in the sum of \$10,000—and the bond is set out and made a part of the plaintiff's complaint. It is also alleged in the complaint that by reason of the bond and the laws applicable thereto, the

railroad Company and Bonding Company became obligated in the event any member of the Shoshone and Bannock tribes of Indians were killed or maimed, to make due payment for all damages accruing therefrom; and that the defendants agreed and promised according to the terms of the bond to make payment for any and all damages accruing by the killing or maiming of any Indian belonging to either of the tribes mentioned.

It is further alleged that on the 29th day of October 1941, the Union Pacific Railroad Company as successor, assignee or lessee of the defendant Oregon Short Line Railroad Company, while operating a railroad train over, through and across the Fort Hall Indian Reservation at a point where the railroad crosses what is known as the school railroad crossing which have been described to you in the testimony here, on the Fort Hall Indian reservation, in the County of Bingham, [198] State and District of Idaho, ran the railroad train into and upon a certain automobile occupied by Ninip Toane, Heler Toane and Frank Pooewe, said persons being Indians and members of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation, for whose benefit the treaty agreement, special Act and Bond mentioned were made, passed, exacted and executed, and being wards of the United States Government, having a right to be on the Fort Hall Reservation at the place and point where the Indians were maimed and killed; that the railroad train operating as mentioned in the complaint, did run into and cause such serious injury as to result

in the death of Ninip Toane and Helen Toane his wife; and cause severe and permanent injuries to Frank Pooewe in that the train did cut, bruise and injure Frank Pooewe in and about his head, legs and body and did otherwise inflict injury to Frank Pooewe resulting in pain and suffering and both temporary and permanent disability. It is also alleged that the defendants refused to make an amicable settlement or any settlement with the parties in interest as required by the bond and provisions of the Act of Congress, and it is further alleged that demand for payment has been made; and it is alleged that the funeral expenses incurred for the burial of the Indian persons killed [199] was approximately \$2,000 and it is further alleged that by reason of the death of the two Indians Ninip Toane and Helen Toane and the injuries to Frank Pooewe that the parties in interest have sustained damages in the sum of \$10,000 and the plaintiff asks for damages against the defendant jointly in that amount.

In the second count of the complaint the plaintiffs set forth the allegations as to the corporate existence of the companies, the bond given and executed, and Acts of Congress, the construction and operation of the railroad across the reservation, and the cause of the death of Ninip Toane, individually and alleging the expense of the funeral to be \$1,000 and asks for damages for the death of Ninip Toane in the sum of \$10,000.

In the third count of the complaint the same allegations are made as to the cause of the death of Helen Toane and plaintiff asks for damages in the

sum of \$10,000 by reason of the death of Helen Toane.

In the fourth count of the complaint the same allegations are made except that plaintiff alleges the serious injury of Frank Pooewe and asks for damages by reason of such injuries in the sum of \$10,000. Plaintiff asks for their costs and disbursements in each count of the complaint. [200]

The defendants have filed their answer to the complaint and have admitted the Acts of Congress, the execution and delivery of the bond; the corporate existence of the various companies; admit that the Oregon Short Line Railroad Company is the successor of the Utah Northern Railway Company, and admit that it operated trains across the Fort Hall Indian Reservation; admit that the railroad train collided with an automobile in which Helen Toane, Ninip Toane and Frank Pooewe were riding, and admit that the Indians were rightfully upon the reservation but deny that they were rightfully upon the railroad crossing at the time of the collision and admit that Helen Toane and Ninip Toane were seriously injured from which injuries they died; admit that Frank Pooewe sustained a bruise on his head and a fractured rib resulting in temporary but not great suffering, and resulting in a brief temporary disability; the defendants deny that the funeral expenses amounted to \$2,000 and deny that any expenses were incurred as funeral expenses in excess of \$145.00.

By way of separate and distinct defense the defendants allege that at the time and place of the

collision described in the complaint, the engine and cars of the train were approaching the highway crossing described, on a track that was straight and level; [201] with the headlight of the engine burning brightly, and the bell of the engine being sounded and that the train and headlight of the engine and the engine were in plain view of the Indians described in the complaint continuously for at least three quarters of a mile before the engine reached the highway crossing and could have been clearly seen before they drove upon the railroad track and in the path of the train if they had looked while in a safe place and at a safe distance, and that it was their duty to do so at any time and point after they were within two hundred feet of the railroad crossing, and they further allege that the whistle and bell of the engine could have been clearly heard by the Indians before they drove upon the track or within two hundred feet or any intermediate point before entering upon the track if they had listened; and they neither looked or listened but drove upon the railroad track and stopped the vehicle in which they were riding when the locomotive engine was so close to the crossing that those in charge of the train and engine could not avoid colliding with the said vehicle, and it is alleged that the collision was due solely to the acts and omissions of the Indians which acts and omissions were the sole proximate cause of the collision.

The same admissions, denials and defenses [202] are made to each of the counts of the complaint.



The defendants ask that they be dismissed with their just costs and disbursements incurred.

If in your deliberations you should come to the consideration of damages. You will take into consideration the evidence admitted and the instructions of the Court as to the law. If you conclude that the plaintiff is entitled to damages, in no event will you allow any greater amount than prayed for, that is; in no event should your verdict be for an amount greater than \$10,00 by reason of the death of Ninip Toane; \$10,000 by reason of the death of Helen Toane and \$10,00 by reason of the injuries to Frank Poewee.

You are the sole and exclusive judges of the evidence and the credibility of the several witnesses and of the weight to be given to the testimony. In weighing the testimony of the witness you have a right to consider his demeanor on the witness stand, the fairness or lack of fairness, frankness or lack of frankness, his interest or lack of interest in the result of the trial and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise effecting the credibility of such witness and to give to the testimony of the several [203] witnesses just such degree of weight as in your judgment it is entitled to.

If you should feel that the Court has any opinion as to what the evidence shows, you will not consider that in any sense, that is entirely your responsibility, and as I have told you, you are the sole judges of the evidence and the credibility of the



witnesses and the weight to be given the testimony.

You are instructed that the Act of Congress and particularly the Act of September 1, 1888, 25 Stat. 452, evidences a policy of exacting from the railroad Company, indemnification for any and all damages to life and property of the Indians accruing out of the operation of the railroad within the reservation. This statute contemplates and requires the payment of damages independent of negligence, also requires the payment of damages if the loss was occasioned by an inevitable and unavoidable accident. It does not contemplate and require the payment of damages if the acts of the parties complaining was the proximate cause of the injury. With this exception the acceptance of the burden was an express or implied condition of the granting of the right-of-way of the railroad company over and across the Fort Hall Indian Reservation. [204]

You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred.

The Jury is instructed that in their popular sense, the words used in the Act of Congress of September 1, 1888, 25 Stats., 452, reasonably imported the broad purpose of saving the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation harmless and of insuring them against loss occasioned by inevitable accidents.

The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats. 452, the Rail-

road Company indemnifies the Shoshone and Bannock Tribes of Indians of the Fort Hall Reservation against any and all damages which may accrue to said tribes, or either of them, or of their livestock, in the construction or operation of said railroad or by reason of fires originating thereby; and is an insurer in respect to such damages, the only exceptions to this rule would be where the acts of the parties complaining was the proximate cause of the accident as explained elsewhere in these instructions. [205]

You are instructed that the statute upon which this suit is based provides with respect to persons who have been killed and that monies recovered in such suits shall be placed into the Treasury of the United States to the credit of the particular Indians entitled to the same, and be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior. From this it follows, and you are so instructed that there can be no award to or recovery of damages by the tribe in this suit, but whatever award, if any, shall be made must be limited to damages proven to have been sustained by individual members of the tribe within the rules of law stated elsewhere in these instructions.

The right to recover damages because of the death of Ninip Toane and Helen Toane is limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. If you find that no individual was deprived of a reasonable expectation of pecuniary benefits on account of the death of Ninip Toane or Helen Toane

you will not award any damages to anyone on account of the death of either of them. There can be no recovery by or on behalf of anyone for the death of Ninip Toane or [206] Helen Toane on account of grief or mental anguish or loss of the society or companionship of either of said persons. Mere blood relationship does not afford any basis for the award of damages. Elements of damage within the realm of possibility but not fairly shown to be reasonably probable do not form the basis for an award of damages.

The Court charges you that there can be no recovery in this suit for damages to or destruction of the automobile.

In the event that you shall award damages for funeral expenses they must be limited to such expenses as have been paid by the beneficiaries, or for which they are liable, provided the reasonable value thereof is shown, and provided it appears that the amounts charged are reasonable.

You should disregard any statement of counsel for either side, if any were made during the trial or the argument in this case which are contrary to, or not in accord with your recollection of the evidence and you will also disregard all evidence which may have been offered by either side and not admitted in evidence, [207] and also it is your duty to disregard any evidence which may have been ordered stricken from the record.

In this Court it is necessary that all jurors concur in finding a verdict, even in a civil case of this character. Forms of verdicts have been prepared for you and you will have no difficulty in using

them. If you find in favor of the plaintiff and against the defendants, you will insert in the blanks left for that purpose the amounts you find the plaintiff is entitled to recover. If you find in favor of the defendants you will use the form in which there is no blank left.

When you retire to your jury room you will elect one of your number as foreman, and when you have arrived at a verdict it will be signed by your foreman alone and returned into open Court.

The Bailiff will be sworn and you will retire to consider your verdict.

Mr. Casterlin: Comes now the plaintiff before the jury has retired to consider their verdict and in the presence of the jury, and excepts to the following instructions, beginning with the words: "By way of separate and distinct defense the defendants allege \* \* \* \* \*" and continuing thence to the words: "The same admissions, denials and defenses are made to each of the counts of the complaint." [208]

Plaintiff excepts to that part of the instructions beginning with the words: "It does not contemplate and require the payment of damages if the acts of the parties complaining was the proximate cause of the injury,—" and ending with the words: "\* \* \* over and across the Fort Hall Indian Reservation."

Plaintiff further excepts to the following instruction given by the Court: "You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by

any new cause, produces an event, and without which the event would not have occurred.”

Plaintiff excepts to the following instruction or portion of instruction given by the Court: “\* \* the only exceptions to this rule would be where the acts of the parties complaining was the proximate cause of the accident as explained elsewhere in these instructions.” This is the latter part of an instruction given by the Court beginning with: “The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats. 452, the railroad company indemnifies the Shoshone and Bannock tribes of Indians \* \* \* \*” and so forth.

Plaintiff excepts to that part of the instructions given by the Court, beginning with the words: “The right to *recovery* damages because of the death of [209] Ninip Toane and Helen Toane is limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. \* \* \* \*” and ending with the words: “\* \* \* \* Elements of damage within the realm of possibility but not fairly shown to be reasonable probable do not form the basis for an award of damages.” And also excepts to the *follows* instruction of the Court: “The Court charges you that there can be no recovery in this suit for damages to or destruction of the automobile.”

The Plaintiff further excepts to the following instruction given by the Court: “In the event that you shall award damages for funeral expenses they must be limited to such expenses as have been paid by the beneficiaries, or for which they are liable,



provided the reasonable value thereof is shown, and provided it appears that the amounts charged are reasonable.”

For the reason that the defense of the defendants designated in the answer as the fourth defense is not a legal defense to this action under the law and the facts in this case. For the reason that proximate cause is not a defense to this action, and the facts alleged to be the proximate cause are all matters of negligence and not within the purview of the special Act of September 1, 1888 and the bond executed in connection therewith. That proximate cause not being a defense to this action [210] therefore the definition of the term proximate cause is improper. That there is no exception whatever to the provisions of the Act of September 1, 1888 requiring the payment of all damages which may accrue to the said tribes or either of them or their livestock by the construction or operation of the railroad or by fires originating thereby and the railroad is an insurer against all damages of every kind and description accruing to the Shoshone or Bannock tribes or any member thereof by reason of the construction and operation of the railroad through the reservation, pursuant to the Act of September 1, 1888.

For the reason that the right to recover damages for the death of any Indian is not limited to the reasonable expectation of pecuniary benefits of or to particular individuals, and the rules for determining damages in the ordinary cause for personal injury or death do not apply in this action, which is



predicated upon a treaty with the Shoshone and Bannock Indians and also a particular Act of Congress defining the rights and obligations of the respective parties named therein, and

For the reason that the automobile referred to in the instructions and concerning which testimony was introduced in this action is and was property of Indian ward of the Government and a member of the Shoshone-Bannock tribe of Indians, and the pleadings in this case [211] fortified by a bill of particulars set forth a claim for damages by reason of the destruction of the automobile.

Also for the reason that the funeral expenses are damages within the meaning and purview of the Act of September 1, 1888, for which the defendants are liable and an appropriate Indian funeral having been conducted in accordance with Indian custom and practice.

The reasons for the objections here stated refer to the instructions excepted to and each and every thereof.

The Court: The objections are overruled. and of course, you may have your exceptions.

Mr. Thompson: Come now the defendants in the presence of the Court and jury, immediately following the charge of the Court to the jury and before the jurors have retired to consider their verdict and excepts to the following instructions and portions of instructions given by the Court to the jury: “\*\*If you conclude that the plaintiff is entitled to damages, in no event will you allow any

greater amount than prayed for, that is; in no event should your verdict be for an amount greater than \$10,000 by reason of the death of Ninip Toane; \$10,000 by reason of the death of Helen Toane, and \$10,000 by reason of the injuries to Frank Poewe." The exception being based upon the ground that under the bond and statute, the maximum liability on the bond and [212] statute upon which it is based in this suit is limited to a total aggregating the sum of \$10,000 and this, by the instruction is given is exceeded by \$20,000.

The defendants except to the following instruction given by the Court, following the reference to the Act of September 1, 1888, and given in the following words: "\*\*\*\* This Statute contemplates and requires the payment of damages independent of negligence, also requires the payment of damages if the loss was occasioned by an inevitable and unavoidable accident." Upon the ground that it is not within the theory, language or spirit of the bond or the statute that the Railroad Company or the surety should be required to pay damages for loss occasioned by an inevitable accident or an unavoidable accident.

The defendants except to the following instruction given by the Court: "The jury is instructed that in their popular sense, the words used in the Act of Congress of September 1, 1888, 25 Stats. 452 reasonably imported the broad purpose of saving the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Reservation harmless, and of insuring them against loss occasioned by inevi-

table accident." Upon the ground [213] that neither the language of the statute or the bond given pursuant thereto import either in language or in law an obligation tantamount to or constituting insurance against loss, and does not insure against loss occasioned by an inevitable accident and such is not the literal or legal purpose or intent of the language or spirit of either the statute or the bond.

Upon the same grounds and for the same reasons the defendants except to the following language used in the instructions of the Court: "\*\*\*\*The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats 452, the railroad company indemnifies the Shoshone and Bannock tribes of Indians of the Fort Hall Reservation against any and all damages which may accrue to said tribes or either of them, or of their livestock, in the construction or operation of said railroad or by reason of fires originating thereby; and is an insurer in respect to such damages." and particularly excepts to the following words: "and is an insurer in respect to such damages."

The defendants except to the refusal of the Court to give the following instruction requested by the defendant, designated as defendants' requested instruction number 1, reading as follows: "You are instructed in [214] this suit that the defendant were required to and did give a bond to secure the payment of such damages as might accrue as a result of killing or injuring members of the Shoshone and Bannock Indians on the Fort Hall Reservation. You are further instructed that damages do not accrue

for the killing or injuring of a person without negligence or other fault, and since no negligence on the part of either of the defendant railroad Companies is established there is no liability on the bond, and you are directed to render a verdict against the plaintiff and in favor of the defendants." Upon the ground that the statute provides only for the giving of a bond for the recovery of damages which may accrue to the Indians; and that damages do not accrue without wrong on the part of the party complained of, nor under the language or purpose of the statute and the bond except by fault or negligence or invasion of the legal right by the party charged.

The defendants except to the refusal of the Court to grant their sixth request, reading as follows: "The Court calls your attention to the fact that the plaintiff has seen fit to, in a sense, repeat its asserted right of action by restatement of substantially the same thing in several counts. You should not be [215] misled by this into assuming, if you should find in favor of the plaintiff, that you should restate or repeat or multiply any items of damage. All that the plaintiff is entitled to by way of a verdict, in the event that you shall award any sum to the plaintiff, is, first a single assessment or item of damages on account of the death of Ninip Toane and Helen Toane, and second a single assessment or item of damages on account of injuries, if any, to Frank Pooewe." Upon the ground that the limit of the bond and the obligation arising under

and from the Statute and bond does not exceed the total sum of \$10,000.

Defendants except to the refusal of the Court to grant their requested instruction number seven reading as follows: "You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the tracks. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears." Upon the ground that the failure of the [216] driver of the automobile and the other occupants to observe this law which was binding upon them was the proximate cause of their injuries, or if not the proximate cause of their injuries, as a matter of law, was a proper subject for the consideration of the jury.

Defendants except to the refusal of the Court to grant their requested instruction number 9, the first paragraph of which consists of a definition of proximate cause concerning which no complaint is made but the second paragraph applies the definition to hypothetical facts or assumed facts in such a way as to enable the jury to make an application of the principle of law involved, in place of merely furnishing them with an abstract instruction. The paragraph excepted to reads as follows: "\*\*\*where a collision occurs at a railroad crossing



under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching train or engine and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause [217] of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees.”

The Court: I would like to hear your theory very briefly on the liability under this bond, that is, the amount, or limit of the liability.

(Remarks of counsel not transcribed)

The Court: I will overrule the objections and let the instructions stand as given and you will have your exceptions in the record.

[Endorsed]: Filed January 17, 1944. [218]

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[Title of District Court and Cause]

DEFENDANTS' REQUESTED  
INSTRUCTIONS

Filed October 19, 1943

Come now the defendants and request the court to give to the jury, in his charge, the following instructions:

Give defendants' requested instruction No. 1; in



the event of the failure to give defendants' requested instruction No. 1, then said defendants, saving an exception to the ruling of the court, requests the court to give its instructions Nos. 2 to 9, herewith submitted.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants

1.

You are instructed in this suit that the defendants were required to and did give a bond to secure the payment of such damages as might accrue as a result of killing or injuring members of the Shoshone and Bannock Indians on the Fort Hall Reservation. You are further instructed that damages do not accrue for the killing or injuring of a person without negligence or other fault, and since no negligence on the part of either of the defendant railroad companies is established there is no liability on the bond, and you are directed to render a verdict against the plaintiff and in favor of the defendants.

2.

You are instructed that the statute upon which this suit is based provides with respect to persons who have been killed that any monies recovered in such suits shall be placed into the Treasury of the United States to the credit of the particular Indian or Indians entitled to the same, and be paid to him or them, or otherwise expended for [219]

his or their benefit, under the direction of the Secretary of the Interior. From this it follows, and you are so instructed, that there can be no award to or recovery of damages by the Tribe in this suit, but whatever award, if any, shall be made must be limited to damages proven to have been sustained by individual members of the Tribe within the rules of law stated elsewhere in these instructions.

## 3.

The right to recover damages because of the death of Ninip Toane and Helen Toane is limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. If you find that no individual was deprived of a reasonable expectation of pecuniary benefits on account of the death of Ninip Toane or Helen Toane you will not award any damages to anyone on account of the death of either of them. There can be no recovery by or on behalf of anyone for the death of Ninip Toane or Helen Toane on account of grief or mental anguish or loss of the society or companionship of either of said persons. Mere blood relationship does not afford any basis for the award of damages. Elements of damage within the realm of possibility but not fairly shown to be reasonably probable do not form the basis for an award of damages. 227 U.S. 145, 227 U.S. 59, 292 U.S. 246.

## 4.

The court charges you that there can be no recovery in this suit for damages to or destruction of the automobile.

## 5.

You are not at liberty to award any damages on account of funeral expenses.

In the event of the refusal of the Court to give the above instruction, then the defendants save an exception to such refusal, and requests as follows:

In the event that you shall award damages for funeral expenses they must be limited to such expenses as have been paid by the beneficiaries, or for which they are liable, provided the reasonable value thereof is shown, and provided it appears that the amounts charged are reasonable.

## 6.

The court calls your attention to the fact that the plaintiff has seen fit to, in a sense, repeat its asserted right of action by restatement of substantially the same thing in several counts. You should not be misled by this into assuming, if you should find in favor of the plaintiff, that you should restate or repeat or multiply any item of damages. All that the plaintiff is entitled to by way of a verdict, in the event that you shall award any sum to the plaintiff, is, first, a single assessment or item of damages on account of the death of Ninip Toane and Helen Toane, and second, a single assessment or item of damages on account of injuries, if any, to Frank Pooewe.

## No. 7

You are instructed that the law of Idaho requires travelers upon the highway and about to cross a

railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the tracks. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears.

#### No. 8

You are instructed that before the plaintiff can recover in this case it must be established by the evidence that the act of the defendants in operating said train at the time and place of the accident was the proximate cause of the accident and the ensuing injuries to, and the death of, the occupants of the said vehicle, but if you find from the evidence that the proximate cause of said accident was not that of the defendants but was the failure of the occupants of the vehicle to perform their duties, as I have heretofore instructed you, as they approached and attempted to pass over this crossing, then your verdict must be in favor of the defendants. [221]

#### No. 9

By "proximate cause" is meant the cause from which the injury or death complained of is the ordinary and natural result, and is usual and might have been reasonably expected to occur from such cause. In order to warrant a finding that an act is the proximate cause of injury or death, it should appear that the injury or death was the natural

and probable consequence of the act complained of.

Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching engine or train and could have plainly seen it, if he had looked, or could have heard its signals if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees. [222]

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[Title of District Court and Cause]

#### ORDER AS TO ORIGINAL EXHIBITS

The defendants in the above entitled cause having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein, and it appearing to the Court that Exhibits 1, 1a and 3 to 8, inclusive, consisting of various receipts and photographs, should be inspected by the appellate court and sent to the appellate to court in lieu of copies thereof.

It Is Hereby Ordered that the original Exhibits 1, 1a and 3 to 8, inclusive, be sent to the appellate court in lieu of copies thereof, or in lieu of being copied in the transcript of the record on appeal, to be such court held for inspection and used on

the appeal taken by the appellants, and it is further ordered that upon completion of the use thereof by the appellate court that the same be returned to this court.

Dated, this 3d day of January, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed January 3, 1944. [223]

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[Title of District Court and Cause.]

MINUTES OF THE COURT

March 22, 1943

On motion of the plaintiff, the trial of this cause was continued for the term.

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[Title of District Court and Cause]

MINUTES OF THE COURT

October 11, 1943

Hearing on the plaintiff's Motion to Strike from the Answer came on before the Court. E. H. Casterlin, Assistant District Attorney, appeared for the plaintiff, and H. B. Thompson, Esquire, for the defendant.

After hearing argument of respective counsel, the Court took the Motion under advisement.



[Title of District Court and Cause]

## MINUTES OF THE COURT

October 18, 1943

Counsel for the respective parties being present, the Court at this time announced his conclusions on defendants' Motion to require the plaintiff to elect upon which counts of the Complaint the plaintiff will proceed in trial. Said Motion was sustained. The plaintiff thereupon elected to proceed on Counts I, II, III, and IV of the Complaint. The Motion directed to paragraph XIII of the 5th, 6th, and 7th Counts of the Complaint were sustained by the Court. The plaintiff's Motion to Strike the defendants' 2nd and 4th defenses was granted, and the Motion to Strike defendants' first defense was denied.

This cause came on for trial before the Court and a jury, E. H. Casterlin, Assistant District Attorney, appearing for the United States and Messrs. H. B. Thompson and L. H. Anderson appearing as counsel for the defendants.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at [224] a time, written on separate slips of paper, to secure a jury. George Ball, J. C. Hardin, and Mrs. Lewis Hammond, whose names were so drawn, were excused for cause; George T. Cox and Mrs. R. R. Beers, whose names were also drawn, were excused on the plaintiff's peremptory challenge; and O. M. Hess, whose

name was also drawn, was excused on the defendants' peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

Lloyd B. Robinett	Bert Dimick
Mrs. Grace Keppner	Mrs. Reta Austin
Don S. Kent	Merle Miller
Joseph N. Arbon	Talmadge Mickelsen
Able Kunz	D. H. Manwaring
Mrs. W. A. Moss	H. P. Sorensen

A statement of the plaintiff's case was made by the District Attorney, and a statement of the defendants' case was made by the defendants' counsel.

Willie Edmo was sworn as an Indian-English interpreter, and so appeared for the purpose of examination of Indian witnesses.

Whereupon, Leon M. Henry, Adelia Toomuzzo Weiser, Mrs. Pokibro, Helen Young, Dr. W. L. Olsen, and Frank Poewe were sworn and examined as witnesses on the part of the plaintiff. Lamar Pokibro was sworn and an offer of proof was made by the plaintiff.

After admonishing the jury, the Court excused them to 10 o'clock A. M., on October 19, 1943, and continued the trial to that time. [225]

[Title of District Court and Cause.]

## MINUTES OF THE COURT

October 19, 1943

This cause came on for further trial before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Bill Edmo, Jacob Browning, Tom Tyboats, and Toane were sworn and examined as witnesses and other evidence was introduced on the part of the United States, and here the plaintiff rests.

Lewis B. Griffin, M. L. Dicks, Mrs. Una Jones, and Winn McCurdy were sworn and examined as witnesses on the part of the defendants, and here the defendants rest.

On rebuttal, Frank Poewe was recalled and further examined as a witness on the part of the plaintiff, and here both sides close.

The plaintiff's counsel moved the Court to strike the fourth defense on all causes of action, which Motion was denied by the Court.

The defendants' counsel moved the Court to direct the jury to return a verdict in favor of the defendants, which Motion the Court denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict. While the jury was still out, the Marshal was directed to provide them with dinner at the expense of the United States.

Exceptions were taken to certain instructions by both the plaintiff and defendants.

On the same day the jury returned into Court, counsel for respective parties being present, whereupon the jury presented their written verdict, which is in the words following: [226]

“In The United States District Court For The  
District of Idaho Eastern Division

### VERDICT

We, the jury in the above entitled cause, find for the plaintiff, and fix damages for the death of Ninip Toane in the sum of \$1250.00; and fix damages for the death of Helen Toane in the sum of \$1250.00; and fix damages for the maiming and injury to Frank Poewe in the sum of \$2000.00.

D. H. MANWARING,  
Foreman”

The verdict was recorded in the presence of the jury, and then read to them, and they each confirmed the same.

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[Title of District Court and Cause.]

### MINUTES OF THE COURT

November 3, 1943

The defendants' motion to set aside the verdict and judgment entered herein and for judgment in

favor of the defendants notwithstanding the verdict in accord with the defendants' motion for a directed verdict in favor of the defendants, and, in the event of the failure of the Court to grant said motion, for an order setting aside the verdict and judgment entered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the rules of this court, came on for hearing before the Court, H. B. Thompson, Esquire, appearing as counsel for the defendants and E. H. Casterlin, Assistant District Attorney, appearing for the United States.

The motions were taken under advisement by the Court. [227]

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[Title of District Court and Cause.]

### STATEMENT OF POINTS

Come now the defendants-appellants above named, and make the following statement of the points upon which they intend to rely in the appeal taken to the United States Circuit Court of Appeals of the Ninth Circuit in the above entitled cause:

#### I.

That the evidence is insufficient to justify the verdict and judgment for the death of Ninip Toane and Helen Toane, and injuries to Frank Poewe, or either of them, in that the evidence establishes that the sole proximate cause of the collision and the consequences thereof was the act of the driver of the automobile in attempting to cross the track

immediately in front of the approaching train which could have been seen if he had looked and could have been heard if he had listened.

## II.

That the evidence is insufficient to support a verdict or judgment for \$1,250.00, or any other substantial amount, on account of the death of Ninip Toane.

## III.

That the evidence is insufficient to support a verdict or judgment for \$1,250.00, or any other substantial amount, on account of the death of Helen Toane. [228]

## IV.

That the evidence is insufficient to sustain any damage for funeral expenses.

## V.

That the evidence is insufficient to support a finding that any of the Indians described in the complaint were killed or injured in consequence of the fault or negligence of any of the defendants, or their agents or servants.

## VI.

That the damages assessed by the jury account of the death of Ninip Toane and Helen Toane are excessive and appear to have been given under the influence of passion and prejudice.

## VII.

The Court erred in overruling the defendants' objection to the admission of evidence of funeral expenses.



## VIII.

The Court erred in denying defendants' motion for directed verdict in favor of the defendants.

## IX.

The Court erred in refusing and denying defendants' requested instructions numbers 1, 7, 8 and 9.

## X.

The Court erred in charging and instructing the jury that the defendants were bound to compensate or indemnify the plaintiff, or those on whose behalf the suit was brought, for loss or injury resulting from inevitable or unavoidable causes. [229]

## XI.

The Court erred in striking from defendants' answer the third defense set up therein as to each of the First, Second, Third and Fourth counts set forth in the complaint.

## XII.

The Court erred in denying defendants' petition for judgment notwithstanding the verdict and alternatively for new trial.

Dated this 3rd day of January, 1944.

H. B. THOMPSON,

Attorney for Defendants-Appellants Residing at: Salt Lake City, Utah.

L. H. ANDERSON,

Attorney for Defendants-Appellants Residing at: Pocatello, Idaho.

Service of the foregoing Statement of Points by receipt of a copy thereof is hereby admitted this 3rd day of January, 1944.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff -  
Appellee

[Endorsed]: Filed January 3, 1944. [230]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL.

Come now the defendants-appellants, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, and hereby designate the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

The complete record and all the proceedings and evidence in the action, including—

1. Complaint
2. Motion for more definite statement and Motion for Bill of Particulars.
3. Bill of Particulars, etc.
4. Answer

5. Plaintiff's Motion to strike certain defenses from answer
6. Defendants' Motion to strike certain portions of the complaint
7. Defendants' Motion to Elect
8. Verdict of the Jury
9. Judgment, with directions for entry thereof
10. Petition on Motion for Judgment Notwithstanding the Verdict and Alternatively for New Trial [231]
11. Order Denying Motion for Judgment Notwithstanding the Verdict and Alternatively for New Trial
12. Notice of Appeal
13. Petition for approval of supersedeas and stay on appeal
14. Order approving bond and granting stay of execution
15. Supersedeas Bond
16. Cost Bond on Appeal
17. All testimony taken at the trial, the same being contained in the Reporter's Transcript, together with instructions given by the Court to the Jury, defendants' requested instructions and exceptions taken to instructions given by the Court and exceptions to instructions requested but not given by the Court.
18. All exhibits offered or introduced in evidence
19. Order of Court transmitting original Exhibits 1, 1a and 3 to 8, inclusive
20. All Court Minutes

21. Statement of points upon which defendants rely on appeal
22. This Designation of Contents of Record, Proceedings and Evidence on Appeal, and Proof of Service.

Dated this 3d day of January, 1944.

H. B. THOMPSON

Attorney for Defendants-Appellants Residing at Salt Lake City, Utah

L. H. ANDERSON

Attorney for Defendants-Appellants Residing at Pocatello, Idaho

Service of the foregoing Designation of Contents of Record on Appeal by receipt of a copy thereof is hereby admitted this 3rd day of January, 1944.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff-Appellee

[Endorsed]: Filed January 3, 1944. [232]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED  
STATES DISTRICT COURT TO TRAN-  
SCRIPT OF RECORD

United States of America,  
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 232 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellants, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$34.40, and that the same have been paid in full by the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 29th day of January, 1944.

[Seal]

W. D. McREYNOLDS,  
Clerk.

[Endorsed]: No. 10675. United States Circuit Court of Appeals for the Ninth Circuit. Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation and Union Pacific Railroad Company, a corporation, Appellants. vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho Eastern Division.

Filed February 2, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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United States Circuit Court of Appeals  
For The Ninth Circuit

No. 10675

THE OREGON SHORT LINE RAILROAD COM-  
PANY, a corporation, SAINT PAUL-MER-  
CURY INDEMNITY COMPANY OF ST.  
PAUL, a corporation, and UNION PACIFIC  
RAILROAD COMPANY, a corporation,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

STIPULATION DISPENSING WITH  
PRINTING EXHIBITS

It is Hereby Stipulated between the parties here-



to through their respective counsel that Exhibits 1, 1a, and 3 to 8 inclusive, which were received in evidence at the trial in the above entitled cause, be considered by this court in their original form without being printed or reproduced for the reason that said exhibits are not of a printable type, because exhibits 3 to 8 inclusive are photographs of the railroad crossing where the accident occurred and the surrounding physical conditions, exhibit 1 consists of numerous bills and receipts attached, together with adding machine computations thereof, and exhibit 1a being the envelope in which said receipts and data are contained.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Appellants

JOHN A. CARVER

U. S. Attorney

Attorney for Appellee

So Ordered:

CURTIS D. WILBUR

Senior United States Circuit  
Judge

[Endorsed]: Filed Feb. 3, 1944. Paul P.  
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF STATEMENT OF POINTS  
FILED IN THE DISTRICT COURT AND  
DESIGNATION OF RECORD

Comes now the appellants Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, by their attorneys herein, and hereby adopt the statement of points upon which they intend to rely in the appeal of the above case which was filed with the Clerk of the District Court on the 3rd day of January, 1944.

The appellants deem the entire record as filed to be necessary for the consideration of the contentions contained in said statement of points filed with the Clerk of the District Court.

Dated this 1st day of February, 1944.

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Appellants

[Endorsed]: Filed Feb. 3 1944. Paul P. O'Brien, Clerk.

